

1992

Allocation of Loss Due to Fraudulent Wholesale Wire Transfers: Is There a Negligence Action Against a Beneficiary's Bank After Article 4A of the Uniform Commercial Code?

Robert M. Lewis
University of Michigan Law School

Follow this and additional works at: <https://repository.law.umich.edu/mlr>



Part of the [Banking and Finance Law Commons](#), [Commercial Law Commons](#), [Legislation Commons](#), and the [Torts Commons](#)

Recommended Citation

Robert M. Lewis, *Allocation of Loss Due to Fraudulent Wholesale Wire Transfers: Is There a Negligence Action Against a Beneficiary's Bank After Article 4A of the Uniform Commercial Code?*, 90 MICH. L. REV. 2565 (1992).

Available at: <https://repository.law.umich.edu/mlr/vol90/iss8/8>

This Note is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

Allocation of Loss Due to Fraudulent Wholesale Wire Transfers: Is There a Negligence Action Against a Beneficiary's Bank After Article 4A of the Uniform Commercial Code?

Robert M. Lewis

INTRODUCTION

Every day in the United States, wholesale wire transfers send over one trillion dollars between banks,¹ and on busier days the value approaches twice that amount.² The importance of wire transfers will grow tremendously as electronic banking eclipses paper mechanisms.³ Until 1989, however, no comprehensive body of law existed to govern the rights and obligations of the parties to a wire transfer. The drafters of Uniform Commercial Code ("UCC" or "the Code") article 4A meant to solve that problem and dispel the uncertainty regarding liability for unauthorized wire transfers.⁴ However, article 4A inadequately determines liability in cases where a bank negligently honors a fraudulent wire transfer.⁵

1. U.C.C. art. 4A Prefatory Note (1991) (all references in this Note are to the 1991 version of the UCC, including the amendments to articles 3 and 4). Wholesale wire transfers, a subset of the larger group of transactions known as electronic funds transfers (EFTs), move funds electronically between two entities. *Wholesale* transfers are nonconsumer transfers, usually involving large amounts of money, which occur primarily between corporations and banks, see U.C.C. § 4A-104 cmt. 2, as opposed to *consumer* transactions such as point-of-sale debit and automated-teller-machine (ATM) transactions. U.C.C. art. 4A Prefatory Note. The Electronic Funds Transfer Act (EFTA), 15 U.S.C. § 1693(a)-(r) (1988), governs most aspects of consumer EFTs and article 4A's coverage excludes any transaction covered by EFTA. U.C.C. § 4A-108.

2. *Banque Worms v. BankAmerica Intl.*, 570 N.E.2d 189, 194 (N.Y. 1991).

3. Michael I. Spak, *The Case to Be Made for Proposed Article 4A of the Uniform Commercial Code: What's a Trillion Dollars Between Friends?*, 80 KY. L.J. 167, 168 (1991). From 1980 to 1984 the number of wire transfers handled by the two main U.S. transfer networks, Fedwire and Clearing House Interbank Payment System (CHIPS), rose almost 50%. Oliver Wulff, *Two Ways to Achieve the Same Goal: The Model Law on International Credit Transfers and the New U.C.C. Article 4A in the National and International Contexts*, 9 WIS. INTL. L. REV. 69, 70 n.5 (1990).

4. See *Discussion of Uniform Commercial Code, Article 4A — Funds Transfers*, in 66 A.L.I. PROC. 400 (1989) (remarks of Professor Jordan) [hereinafter A.L.I. PROCEEDINGS]; see also *Shawmut Worcester County Bank v. First Am. Bank & Trust*, 731 F. Supp. 57, 62 (D. Mass. 1990). Article 4A governs *funds transfers*, of which a wire transfer is but one type. U.C.C. art. 4A Prefatory Note. This Note uses *wire transfer* and EFT interchangeably and is concerned mainly with electronic transfers, as they are the most common. The position of this Note, however, should also apply to any other sort of article 4A funds transfer. In this Note, article 4A is referred to as both 4A and article 4A.

5. For analyses that do not discuss a paying bank's negligence, see Scott D. Benner, *Commercial Law: Loss Allocation Under U.C.C. Article 4A*, 1990 ANN. SURV. AM. L. 239 (1991); Tony M. Davis, *Comparing Article 4A with Existing Case Law on Funds Transfers: A Series of Case Studies*, 42 ALA. L. REV. 823 (1991) (arguing that article 4A would sufficiently resolve several pre-4A cases); Spak, *supra* note 3, at 200-13 (discussing 4A loss-allocation without mention of

Most transactions should occur smoothly with the new article, but difficulty arises when a bank which eventually pays a fraudulent wire transfer should reasonably have suspected misconduct. In determining loss allocation in these cases, article 4A is confused. Depending on the court's interpretation, 4A either leaves liability uncertain or compels an innocent party to pay. Courts confronting these cases will look to the new Code provisions,⁶ but 4A provides neither certain nor acceptable results. Resolution, however, may be no farther away than the common law.

This Note argues that where a bank reasonably should have known of a fraud but still pays out a wire transfer to an unauthorized recipient, common law negligence should provide a basis for recovery despite the absence of an explicit Code provision imposing liability on the bank. Part I examines the UCC's language itself and analyzes possible cases, under 4A and under articles 3 and 4 by analogy, and discusses the applicability of these other parts of the UCC to wire transfers. Part II examines how extra-Code regulatory systems and the common law would determine wire transfer liability. Part II then discusses how article 4A incorporates banking regulations apart from its provisions and whether 4A displaced the common law negligence action which existed prior to the new article or UCC section 1-103 incorporates it. Part III analyzes explicit and implicit UCC policies, both in general and with respect to wire transfers in particular. Finally, this Part evaluates negligence in light of these policies and considers whether holding the negligent bank liable will promote a more efficient wire transfer system from a societal perspective. This Note concludes that article 4A should not displace negligence as a cause of action, because a negligence claim will prevent inequity and promote efficiency without unduly frustrating Code policies.

I. THE LANGUAGE OF THE CODE

Before the enactment of article 4A, courts looked to several sources of law to resolve liability for wire transfer loss. Some considered other Code provisions; others relied upon the common law.⁷ Article 4A introduces yet another allocative scheme. Article 4A's

beneficiary's bank's potential negligence); Katherine Esposito, Note, *What Regulates Corporate Electronic Funds Transfers?*, 13 SETON HALL LEGIS. J. 75, 99-100 (1989) (same); Tina E. McKelvy, Note, *Article 4A of the Uniform Commercial Code: Finally, Banks and Their Customers Know Where They Stand and Who Pays When a Wire Transfer Goes Awry*, 21 MEM. ST. U. L. REV. 351 (1991) (same).

6. As of November 15, 1991, 32 states (including New York, Illinois, California, and Ohio) had adopted article 4A, and it "appears well on the way to universal enactment by the end of 1993." Fred H. Miller, *The U.C.C. Today: Revisions, Planned Revisions, and State Enactments*, U.C.C. BULL., Jan. 1992, at 1, 2-3.

7. This Note discusses other UCC sections *infra* section I.B.2 and courts' use of the common law *infra* sections II.A.1 and II.B.1.

mandates, however, raise doubts about its efficacy. This Part examines the language of the UCC and its operation in certain fraudulent wire transfer cases and concludes that article 4A fails to provide a sensible solution. But an analogy to articles 3 and 4, this Part argues, suggests a more reasonable treatment of the problem. Section I.A applies 4A's provisions to several hypothetical fraud cases and concludes that under its language an innocent account holder or bank will probably bear the loss even if the fraud is detected. In these cases, however, the article's rationales would not support placing liability on these innocent parties. Additionally, conflict within the Code and with other apposite law weakens 4A's reliability. Section I.B.1 explores the principles of negligence governing a bank's handling of wire transfers, and section I.B.2 examines analogous situations under other UCC articles. These related Code rules likely would place the loss on the least-cost risk-avoider, usually the party who dealt directly with the thief. Section I.B maintains that both UCC liability provisions in analogous situations and article 4A's partial acceptance of negligence principles support the use of negligence law in wire transfer cases. This Part concludes that the language of the Code might encompass a negligence action against the paying bank, but resort to extra-Code law would provide a more coherent solution.

A. Article 4A's "Solutions"

The simplest interbank wholesale wire transfer involves four parties. The customer sending the wire transfer, usually a corporation, is the *originator*.⁸ The originator gives a *payment order* to the *receiving* or *originator's bank* where it has an account;⁹ the receiving-originator's bank then relays its own payment order to the *beneficiary's bank*, instructing payment to the recipient or *beneficiary* of the wire transfer, probably through a deposit in an account.¹⁰ Usually the beneficiary is an intended recipient of the money, but occasionally a transfer goes awry or is not authorized by the account holder in the first place.¹¹ Article 4A is flawed, however, in its treatment of transfers involving a beneficiary's bank that fails to exercise reasonable care. Consider two cases: one involving a suspicious beneficiary and one effectuated by confusing the beneficiary's name and account number.

8. U.C.C. § 4A-104(c).

9. U.C.C. § 4A-103(a)(4).

10. U.C.C. § 4A-103(a)(2)-(3). For a more detailed explanation of the mechanics of a funds transfer, see, e.g., Benner, *supra* note 5, at 242-44; Spak, *supra* note 3, at 172-79; McKelvy, *supra* note 5, at 354-58.

11. Article 4A provides elaborate rules for loss allocation and recovery of erroneously executed wire transfers, see, e.g., U.C.C. §§ 4A-205 (overpayment, duplicate payment or incorrect beneficiary), 4A-303 (execution error), 4A-305 (failure to complete or late execution of payment order), but this Note refers to those rules only when relevant to liability for unauthorized, i.e., fraudulent, wire transfers.

1. *The Suspicious Beneficiary*

A large depositor, such as a corporation or national treasury, maintains accounts in banks across the world. A sophisticated criminal operation somehow cracks the security code that the customer and its banker use,¹² thereby gaining access to the billion-dollar account. Once inside the system, the thief causes a funds transfer to be executed electronically to another bank. Shortly afterwards several individuals arrive at the transferee-beneficiary's bank to collect the transfer. The bank likely balks at gathering several million dollars in cash on a few minutes' notice, but it does nonetheless. Seemingly oblivious to the several men scanning the bank's lobby with hands in coats, or to some other equally suspicious facts, the bank hands over the money to the false beneficiary without seeking identification or confirmation from either the transferring originator's bank or the individual claiming the cash. The thieves disappear. The supposed originator, the victim of the fraud, notices nothing until its checks start to bounce because the transaction satisfied the bank's security procedures.

Perhaps the bank refuses to release the funds, and instead sends the payment order to another bank, which does comply. To one bank the transfer fee may justify the risk of mistaken payment, while others may proceed more cautiously.¹³ Multiple transfers would illuminate the relative unreasonableness of the eventual paying bank's behavior. If several banks refuse to pay and then one does comply, the paying bank may have deviated sufficiently from the norm to have acted negligently. Beyond this hot-potato situation, myriad circumstances may arguably put a beneficiary's bank on notice of suspicious circumstances and impose a duty to act reasonably to prevent the loss or to avoid facilitating it. To illustrate potential negligence claims, this Note will proceed to discuss other situations. The Note does not assume that any one of the fact scenarios presented necessarily constitutes negligence; it will not discuss negligence law in detail. This Note merely argues that situations such as these justify allowing a negligence action to proceed. This first example arguably presents the most obvious case, but in any given situation, a jury or court would make the ultimate negligence determination.

Article 4A will likely deny recovery in this first example, if the originator's bank or its customer, the nominal originator, seeks compensation. At first glance, 4A apparently places the loss on the innocent originator or originator's bank.¹⁴ Because the thieves appeared to

12. See BENJAMIN WRIGHT, *THE LAW OF ELECTRONIC COMMERCE* § 1.3 (1991) ("[L]ines can be tapped, and criminals can break into systems.").

13. In normal circumstances, a chain of several transfers may be needed to effectuate a complex or distant transfer. See U.C.C. art. 4A Prefatory Note.

14. Part 2 of article 4A deals with unauthorized payment orders:

§ 4A-201. Security Procedure.

"Security procedure" means a procedure established by agreement of a customer and a

meet the originator's bank's breached security procedure, assuming that the procedure was commercially reasonable and the transfer

receiving bank [which receives the erroneous order from the thief] for the purpose of (i) verifying that a payment order or communication amending or cancelling a payment order is that of the customer, or (ii) detecting error in the transmission or the content of the payment order or communication. A security procedure may require the use of algorithms or other codes, identifying words or numbers, encryption, callback procedures, or similar security devices. Comparison of a signature on a payment order or communication with an authorized specimen signature of the customer is not by itself a security procedure.

The Official Comment adds:

The question of whether loss that may result from the transmission of a spurious or erroneous payment order will be borne by the receiving bank or the sender or purported sender is affected by whether a security procedure was or was not in effect and whether there was or was not compliance with the procedure.

§ 4A-202. Authorized and Verified Payment Orders.

(a) A payment order received by the receiving bank is the authorized order of the person identified as the sender if that person authorized the order or is otherwise bound by it under the law of agency.

(b) If a bank and its customer have agreed that the authenticity of payment orders issued to the bank in the name of the customer as sender will be verified pursuant to a security procedure, a payment order received by the receiving bank is effective as the order of the customer, whether or not authorized, if (i) the security procedure is a commercially reasonable method of providing security against unauthorized payment orders, and (ii) the bank proves that it accepted the payment order in good faith and in compliance with the security procedure and any written agreement or instruction of the customer restricting acceptance of payment orders issued in the name of the customer. The bank is not required to follow an instruction that violates a written agreement with the customer or notice of which is not received at a time and in a manner affording the bank a reasonable opportunity to act on it before the payment order is accepted.

(c) Commercial reasonableness of a security procedure is a question of law to be determined by considering the wishes of the customer expressed to the bank, the circumstances of the customer known to the bank, including the size, type, and frequency of payment orders normally issued by the customer to the bank, alternative security procedures offered to the customer, and security procedures in general use by customers and receiving banks similarly situated. A security procedure is deemed to be commercially reasonable if (i) the security procedure was chosen by the customer after the bank offered, and the customer refused, a security procedure that was commercially reasonable for that customer, and (ii) the customer expressly agreed in writing to be bound by any payment order, whether or not authorized, issued in its name and accepted by the bank in compliance with the security procedure chosen by the customer.

(d) The term "sender" in this Article includes the customer in whose name a payment order is issued if the order is the authorized order of the customer under subsection (a), or it is effective as the order of the customer under subsection (b).

(e) This section applies to amendments and cancellations of payment orders to the same extent it applies to payment orders.

(f) Except as provided in this section and in Section 4A-203(a)(1), rights and obligations arising under this section or Section 4A-203 may not be varied by agreement.

§ 4A-203. Unenforceability of Certain Verified Payment Orders.

(a) If an accepted payment order is not, under Section 4A-202(a), an authorized order of a customer identified as sender, but is effective as an order of the customer pursuant to Section 4A-202(b), the following rules apply:

(1) By express written agreement, the receiving bank may limit the extent to which it is entitled to enforce or retain payment of the payment order.

(2) The receiving bank is not entitled to enforce or retain payment of the payment order if the customer proves that the order was not caused, directly or indirectly, by a person (i) entrusted at any time with duties to act for the customer with respect to payment orders or the security procedure, or (ii) who obtained access to transmitting facilities of the customer or who obtained, from a source controlled by the customer and without authority of the receiving bank, information facilitating breach of the security procedure, regardless of

processed in good faith by the bank,¹⁵ the customer would be liable for the theft under section 4A-202. Section 4A-203 provides the only apparent escape for the customer: she must prove that the thieves gained access to the security code from a source outside her control.¹⁶ Even if the customer could prove this negative — probably an impossible burden given the organization's size¹⁷ — section 4A-203 holds the innocent originator's bank liable¹⁸ and ignores the bank which paid to the nominal beneficiary under circumstances suggesting negligence.

A fraud that the beneficiary's bank could reasonably detect need not be a single extraordinary transfer as in this first case. Transfers over a period of time may build on each other's suspiciousness until they suggest that a theft is occurring. Perhaps the beneficiary's bank establishes an account for a new customer it knows or should know, either as a matter of common knowledge or as a result of its own investigation, is involved in criminal operations or suffering financial dif-

how the information was obtained or whether the customer was at fault. Information includes any access device, computer software, or the like.

(b) This section applies to amendments of payment orders to the same extent it applies to payment orders.

Comment 3 states:

Subsection (b) of Section 4A-202 is based on the assumption that losses due to fraudulent payment orders can best be avoided by the use of commercially reasonable security procedures, and that the use of such procedures should be encouraged. The subsection is designed to protect both the customer and the receiving bank.

... If a commercially reasonable security procedure is not made available to the customer, subsection (b) does not apply. The result is that subsection (a) applies and the bank acts at its peril in accepting a payment order that may be unauthorized.

Comment 5 explains the customer's risk:

The effect of Section 4A-202(b) is to place the risk of loss on the customer if an unauthorized payment order is accepted by the receiving bank after verification by the bank in compliance with a commercially reasonable security procedure. An exception to this result is provided by Section 4A-203(a)(2). The customer may avoid the loss resulting from such a payment order if the customer can prove that the fraud was not committed by a person described in that subsection.

U.C.C. §§ 4A-201 & cmt., 4A-202, 4A-203 & cmts. 3, 5.

15. See U.C.C. § 4A-202; Thomas C. Baxter & Raj Bhala, *The Interrelationship of Article 4A with Other Law*, 45 BUS. LAW. 1485, 1497 (1990) (describing security procedure requirement); see also J. Kevin French, *Unauthorized and Erroneous Payment Orders*, 45 BUS. LAW. 1425, 1427 (1990) (same).

16. U.C.C. § 4A-203(a)(2).

17. Luc Thévenoz, *Error and Fraud in Wholesale Funds Transfers: U.C.C. Article 4A and the UNCITRAL Harmonization Process*, 42 ALA. L. REV. 881, 904, 944 (1991) (given the complexity of computer banking systems, the burden of proof may present enormous problems in wire cases); cf. French, *supra* note 15, at 1439 ("Depending on how the customer runs his shop[,] ... this negative burden might be very difficult to uphold.").

18. See French, *supra* note 15, at 1440 ("[A] bank is not completely protected from risk of loss by complying with a commercially reasonable security procedure."). But cf. Tomme J. Fent, Note, *Commercial Law: Electronic Funds Transfers: How New U.C.C. Article 4A May Affect Consumers*, 43 OKLA. L. REV. 339, 354 (1990) ("Article 4A would have protected both the consumer and the bank from loss by means of an easily established and maintained security procedure."). At least one state, Tennessee, has "eased the burden" on banks by requiring more proof of innocence by the account holder, see generally McKelvy, *supra* note 5, at 370, but such a modification merely shifts the loss from one innocent party to another, not to the one most at fault, the receiving bank.

ficulty. Over the course of several weeks, this supposed beneficiary receives multiple large transfers from another bank, strongly suggesting a money laundering¹⁹ or skimming²⁰ operation. In a comparable situation, a customer, possibly *known* as a credit risk, deposits and draws increasingly larger checks backed by uncollected funds: the classic check-kite.²¹ In either the kite or the multiple wire transfer situation, the bank should suspect a fraud; but it can pay the wire transfer with impunity under article 4A.²² Yet under article 3, a bank that seeks recovery on a check while suspecting a kite scheme is, at the least, engaged in a highly questionable activity.²³

Article 4A absolves a beneficiary's bank's carelessness in another situation: when the bank receives large transfers from a corporate account at another bank to the personal account of one of the corporation's officers. If a corporate officer or fiduciary deposits corporate checks drawn to the depository bank into her personal account, article 3 assumes the bank has notice of the breach of fiduciary duty.²⁴ Unlike an embezzlement by check, however, an electronic transaction

19. Laura M.L. Maroldy, Note, *Recordkeeping and Reporting in An Attempt to Stop the Money Laundering Cycle: Why Blanket Recording and Reporting of Wire and Electronic Funds Transfers Is Not the Answer*, 66 NOTRE DAME L. REV. 863, 889 (1991) ("[A] high volume of activity by a customer the bank knows little about [may indicate a money-laundering operation].").

20. Cf. U.C.C. § 3-406 cmt. 4 (where an embezzling customer opens a corporate account and immediately deposits a large check payable to the same name, the depository bank may bear liability for failure to exercise ordinary care by honoring the check); *Wymore State Bank v. Johnson Intl. Co.*, 873 F.2d 1082, 1087 (8th Cir. 1989) (summary judgment inappropriate where bank could have detected embezzlement because financial instability of depositor was reasonably knowable by bank officer).

21. *Kite* refers to a situation where a bank customer deposits checks drawn on a distant bank to cover his balance at the first bank. The customer then draws checks on the first bank and deposits them to cover his account at the distant bank. By drawing ever-increasing checks between the banks, the customer is able to secure interest-free loans for the time the checks are being collected. Because the customer's account at any one time reflects a credit balance, no checks bounce. But funds are never collected, for the customer merely shifts paper entries back and forth between the two (or more) banks. Before the kite collapses when a bank finally refuses to honor a check, the check-kiter can defraud a third party by writing what appear to be good checks in exchange for goods or services, and then disappear, leaving the third party and the banks to fight over the loss.

22. Under article 4A, liability for an unauthorized transfer rests on the nominal sending parties, the originator or originator's bank. See *supra* notes 14-18 and accompanying text.

23. Shifting the risk of loss from a kiting scheme with suspicion of the kite may prevent the bank from recovering after erroneously paying on a check. See U.C.C. § 3-418 cmt. 3:

In some cases . . . it may not be clear whether a drawee bank should have a right of restitution. For example, a check-kiting scheme may involve a large number of checks drawn on a number of different banks in which the drawer's credit balances are based on uncollected funds represented by fraudulently drawn checks.

Id. A bank in a kiting scheme arguably also violates its duty of good faith if it seeks to dump the bad checks on another bank. See *infra* notes 46-52 and accompanying text.

24. U.C.C. § 3-307(b)(4). But see *Richards v. Platte Valley Bank*, 866 F.2d 1576, 1578 (10th Cir. 1989), where the court, in a case involving an escrow service officer who misappropriated funds by wire transfer prior to the revisions of article 3 creating notice of the breach of fiduciary duty, held that the bank must have actual knowledge for liability under Colorado law.

may not indicate that a theft is occurring; a bank payment order may not reveal the parties and thus the fraud as clearly as the face of a check would. But knowledge of the beneficiary's identity and the recurring, large sums should alert a conscientious bank to this questionable situation. In the check cases, article 3 supposes that "the person taking the check might have detected the fraud and thus have prevented the loss by the exercise of ordinary care[, and] . . . it is reasonable that that person bear loss to the extent the failure contributed to the loss."²⁵ Presumably a beneficiary's bank's employees will not cease observing the circumstances surrounding wire transfers. Many of these losses might be prevented if the beneficiary bank merely hesitated when reasonably in doubt when processing the information already before them. Information from the beneficiary's application or banking history should be readily available as well.

Moreover, section 4A-201 notes a callback procedure as one possible security procedure.²⁶ Such a precaution apparently causes little enough burden that it suffices for the relation between the originator and its bank. A beneficiary's bank, likewise, could call its transferor for confirmation. Large Canadian banks, for example, currently follow a procedure requiring the beneficiary's bank to check the order's authenticity.²⁷ Yet under 4A, the beneficiary's bank may release the funds to the suspicious beneficiary without remorse or fear of liability.²⁸ In such cases, when 4A releases the negligent beneficiary's bank it defies both common sense and the expectations for analogous situations involving commercial paper.

2. Name and Number Fraud

Article 4A also produces questionable results when another type of theft is attempted. A thief poses as the originator or his agent and orders a wire transfer from the originator's bank in compliance with the bank's security procedure to a beneficiary-account holder at the distant, beneficiary's bank. The payment order describes the beneficiary by name and provides an account number. The number, however, does not match the name given. Instead, it indicates an account at the beneficiary's bank which belongs either to the thief or his confederate or to an innocent third party whom the thief has conned.²⁹ The draft-

25. U.C.C. § 3-404 cmt. 3.

26. See U.C.C. § 4A-201.

27. WRIGHT, *supra* note 12, § 2.5.

28. The lack of constraints on the beneficiary's bank is especially peculiar considering § 4A-404. Under that section, a beneficiary's bank is protected from consequential damages for failure to pay a properly payable funds transfer if the bank can prove it had "a reasonable doubt concerning the right of the beneficiary to payment." U.C.C. § 4A-404(a). Article 4A assumes, therefore, that situations will arise when a beneficiary's bank would doubt the validity of a transaction and should not complete it.

29. In *Bradford Trust Co. v. Texas Am. Bank* — Houston, 790 F.2d 407 (5th Cir. 1986), and

ers of section 4A-207 considered this possibility.³⁰ Under 4A-207(c)(2), the loss falls on the originator's bank unless it gave notice to the account holder that banks executing a funds transfer would direct payment to the beneficiary solely by number, in which case the account holder pays. If the bank conditions wire transfer service on the signing of a release under 4A-207(c)(2), as a savvy and powerful bank probably would, all but the most valued originators-account holders would bear the loss.

Securities Fund Servs., Inc. v. American Natl. Bank & Trust Co., 542 F. Supp. 323 (N.D. Ill. 1982), thieves directed the funds into the account of a third-party merchant from whom they had agreed to purchase valuables. Once the bank told the merchant that the funds were in his account, he released the goods to the thieves who, naturally, declined to participate in the final accounting.

30. See U.C.C. § 4A-207 cmt. 2. Section 4A-207 provides:

§ 4A-207. Misdescription of Beneficiary.

(a) Subject to subsection (b), if, in a payment order received by the beneficiary's bank, the name, bank account number, or other identification of the beneficiary refers to a nonexistent or unidentifiable person or account, no person has rights as beneficiary of the order and acceptance of the order cannot occur.

(b) If a payment order received by the beneficiary's bank identifies the beneficiary both by name and by an identifying or bank account number and the name and number identify different persons, the following rules apply:

(1) Except as otherwise provided in subsection (c), if the beneficiary's bank does not know that the name and number refer to different persons, it may rely on the number as the proper identification of the beneficiary of the order. The beneficiary's bank need not determine whether the name and number refer to the same person.

(2) If the beneficiary's bank pays the person identified by name or knows that the name and number identify different persons, no person has rights as beneficiary except the person paid by the beneficiary's bank if that person was entitled to receive payment from the originator of the funds transfer. If no person has rights as beneficiary, acceptance of the order cannot occur.

(c) If (i) a payment order described in subsection (b) is accepted, (ii) the originator's payment order described the beneficiary inconsistently by name and number, and (iii) the beneficiary's bank pays the person identified by number as permitted by subsection (b)(1), the following rules apply:

(1) If the originator is a bank, the originator is obliged to pay its order.

(2) If the originator is not a bank and proves that the person identified by number was not entitled to receive payment from the originator, the originator is not obliged to pay its order unless the originator's bank proves that the originator, before acceptance of the originator's order, had notice that payment of a payment order issued by the originator might be made by the beneficiary's bank on the basis of an identifying or bank account number even if it identifies a person different from the named beneficiary. Proof of notice may be made by any admissible evidence. The originator's bank satisfies the burden of proof if it proves that the originator, before the payment order was accepted, signed a writing stating the information to which the notice relates.

(d) In a case governed by subsection (b)(1), if the beneficiary's bank rightfully pays the person identified by number and that person was not entitled to receive payment from the originator, the amount paid may be recovered from that person to the extent allowed by the law governing mistake and restitution as follows:

(1) If the originator is obliged to pay its payment order as stated in subsection (c), the originator has the right to recover.

(2) If the originator is not a bank and is not obliged to pay its payment order, the originator's bank has the right to recover.

The rationale of § 4A-207 is that, if the beneficiary's bank must verify the match between name and number, "the benefits of automated payment are lost." U.C.C. § 4A-207 cmt. 2; Spak, *supra* note 3, at 211; cf. Fred H. Miller et al., *Commercial Paper, Bank Deposits and Collections, and Commercial Electronic Fund Transfers*, 42 BUS. LAW. 1269, 1290-91 (1987) (article 4A meant to facilitate speedy transactions despite possible name-number problems).

Operation of section 4A-207, however, poses problems for several reasons. First, as with the suspicious beneficiary cases described in section I.A.1 of this Note, the beneficiary's bank could have prevented the loss without seriously undercutting the benefits of automation.³¹ The beneficiary's bank never bears liability under 4A-207. Yet the bank possessed greater information than the originator's bank, which had no direct contact with the parties involved in the fraud beyond the initial message made in compliance with the security system. The beneficiary's bank dealt with the account holder-beneficiary and, more importantly, it alone could have known of the discrepancy between name and number. For both privacy and logistical reasons, only the beneficiary's bank can check the payment order's accuracy.

A possible money laundering scheme illustrates a second problem with section 4A-207. Suppose an individual deposits with the originator's bank funds that she wishes to launder at a distant beneficiary's bank.³² In collaboration with an account holder at the beneficiary's bank, she then sends money by wire transfer to an account naming an innocent third party as the beneficiary but providing the *account number of her coconspirator*. On the face of the payment order, the innocent party apparently receives the credit because of the name provided. The partner's account actually receives the funds, however, because under 4A-207 the number controls. The partner then "cleanses" the funds when he withdraws them, either in "new" cash or possibly as a cashier's check.³³

Under 4A-207, neither the dummy account fraud, which results in an innocent customer paying for goods she never received, nor the money laundering example poses a threat of liability for the beneficiary's bank. But banks should question large payments that appear to enter, but do not actually reach, the innocent customer's account.³⁴ Reasonable vigilance, such as a simple periodic scan of the records or even a computer program,³⁵ could reveal the discrepancies. Customers' privacy is not threatened, for revelation would occur only within the beneficiary's bank, where the recipient's account is located. Surely a bank may scan its own records; moreover, only the beneficiary's bank has access to this information because of these very same privacy concerns. A bank's obligation to examine a transfer should arise only

31. See Benner, *supra* note 5, at 253 n.104 (computer program to detect error would keep cost low); McKelvy, *supra* note 5, at 379 (beneficiary's bank could detect error at little additional cost). But see U.C.C. § 4A-207 cmt. 2 (reliance on number meant to speed transaction); cf. 12 C.F.R. § 210.27 (1992) (Federal Reserve Bank may rely on number alone and "has no duty to detect any . . . inconsistency.").

32. See Maroldy, *supra* note 19, at 864 (wire transfer has become a common method of money laundering).

33. *Id.* at 888-89 n.132.

34. Cf. *id.* at 889 (multiple transfers suggest money laundering).

35. See *supra* note 31.

in certain cases,³⁶ such as those where a pattern appears or a hitherto unknown customer receives the credits. These limits on the beneficiary's bank's duty should lessen the objection that examinations of transactions will destroy the benefits of wire transfers, speed and low cost.³⁷ The callback possibility discussed above³⁸ also applies. Section 4A-207, however, helps a thief conceal a crime³⁹ which reasonable care may have revealed.

3. *Conflicting Standards and Inapplicable Rationales*

Article 4A's flaws derive from more than just its counterintuitive results in cases involving a negligent beneficiary's bank. Irrelevant rationales, potential internal contradiction, and conflict with other law also raise questions about 4A's coherence. These faults indicate that article 4A alone may not suffice in these cases.

Article 4A's rationales do not support its allocation of liability between the originator and the beneficiary's bank.⁴⁰ The security procedure provisions, sections 4A-201 to 4A-205, allocate liability between only the presumed originator and its bank. They ignore the relationship between the originator's bank or the originator and the beneficiary's bank and so arguably should not apply where both the originator and its bank are innocent, as in the hypothetical cases presented in section I.A.1 of this Note. Also, section 4A-207's language more reasonably addresses the case where an *authorized* originator gives a payment order which the originator's bank subsequently confuses. The provision hinges on whether or not the originator received notice that payment may be made by number alone⁴¹ and thus on what dealings the customer had with her bank. Article 4A attempts to place the loss from name-number fraud on the party normally best able to prevent it,

36. See Maroldy, *supra* note 19, at 864-65 (proposing regulations requiring inquiry only when a transaction meets a money laundering "profile"). A standard of due care would apply the same principle to any potential fraud. Cf. U.C.C. § 4-406 cmt. 4 (bank may meet duty of ordinary care without visual examination of all checks).

37. Thus the fear that cross-checking all payment orders would exceed the cost of losses prevented, see Thévenoz, *supra* note 17, at 902, subsides under the more selective ordinary care duty. See Maroldy, *supra* note 19, at 889-90 (selective requirement balances efficiency against loss-prevention). Prior to the enactment of article 4A, Chase Manhattan Bank consistently double-checked wire transfers made to its accounts, see *id.* at 870 n.34, indicating that competent wire transfer payment need not be blind.

38. See *supra* text accompanying note 26.

39. Federal law prohibits the transfer of funds within the United States with the intent to conceal or with knowledge of the concealment of criminal proceeds. 18 U.S.C. § 1956(a)(2) (West Supp. 1992).

40. Article 4A addresses the originator's duty to complete payment, see U.C.C. § 4A-202(b)-(c), and the discharge of the obligation between the originator and the beneficiary, see U.C.C. § 4A-406(b), which is only relevant in authorized payment cases. In fraud cases, however, article 4A specifically provides only for an allocation between the originator and its bank without regard to the beneficiary's bank's fault. See *supra* notes 14-18, 30 and accompanying text (4A liability provisions).

41. See U.C.C. § 4A-207(c)(2).

the customer. She knows the beneficiary, can secure the correct number,⁴² and will naturally seek to prevent theft. In these cases, however, either no contact occurs between the originator's bank and the bank's actual customer — as in the dummy account case — or such contact will not decrease the risk of loss because the money laundering customer's scheme relies on the discrepancy between name and number. Only the beneficiary's bank has both evidence of the fraud and motivation to reveal it because the customer is either oblivious to the fraud or is himself the wrongdoer. The notice provision itself will be of little value in preventing loss, for banks will understandably shift liability to all but the largest customers by contractually allocating a loss from name-number fraud to them. In these cases involving a negligent beneficiary's bank, 4A's logic simply does not apply.

Inconsistency within the UCC itself similarly casts doubt on 4A's reliability. In the name-number fraud cases under section 4A-207(b)(2), if the beneficiary's bank knows of the variation between name and number, "acceptance of the order cannot occur"⁴³ and the nominal originator need not pay the transfer.⁴⁴ If the beneficiary's bank fails to accept that an unauthorized party is seeking payment despite information sufficient to suggest that possibility, it will not "know" of the fraud.⁴⁵ Not only will this protection encourage willful indifference, but in these cases the beneficiary's bank may arguably have breached its section 4A-105 obligation of good faith, which mandates "honesty in fact and the observance of reasonable commercial standards of fair dealing."⁴⁶ While 4A-105 does not explicitly impose an absolute duty of good faith in all cases, section 1-203 requires that "[e]very . . . duty within [the UCC] imposes an obligation of good faith in its performance or enforcement,"⁴⁷ and section 3-103's definition of good faith includes reasonable commercial standards of fair dealing.⁴⁸ Wire transfers never expressly escape from the 3-103(a)(4) duty, as they do from the article 4 ordinary care duty,⁴⁹ and 3-103's standard "is consistent with the definition[] of good faith applicable to . . . 4A."⁵⁰ Thus, sections 4A-105, 1-203, and 3-103, taken together,

42. See U.C.C. § 4A-207 cmt. 2; Benner, *supra* note 5, at 252; McKelvy, *supra* note 5, at 379 (arguing that § 4A-207 is an attempt to "place the risk of loss on the party possessing the most knowledge of the intended beneficiary and the one who is, therefore, best able to prevent the loss").

43. U.C.C. § 4A-207(b)(2).

44. U.C.C. § 4A-402(b).

45. See U.C.C. § 1-201(25) ("A person [or organization, U.C.C. § 1-201(30)] 'knows' or has 'knowledge' of a fact when [it] has actual knowledge of it.").

46. U.C.C. § 4A-105(a)(6) (emphasis added).

47. U.C.C. § 1-203.

48. U.C.C. § 3-103(a)(4).

49. U.C.C. § 4-103(e).

50. U.C.C. § 3-103 cmt.4.

mandate that a beneficiary's bank abide by reasonable commercial standards of fair dealing.⁵¹

Careless payment in these cases suggests a deviation from this duty.⁵² The intuition of bad faith is most powerful where a bank repeatedly pays transfers to or deals with suspicious individuals, especially if the bank relies on the immense volume of the suspicious customer's business.⁵³ Were a court to find the bank's payment to the beneficiary to be unreasonable,⁵⁴ the beneficiary's bank's ability to rely on account numbers alone under 4A-207 would collide headlong with its duty of good faith as mandated by sections 4A-105, 1-203, and 3-103. Even in cases involving unreasonable payment other than in a name-number fraud, the 4A-105/1-203 reasonable commercial standards requirement also should foreclose reimbursement of the beneficiary's bank. Where the beneficiary's bank's behavior rises to the level of unreasonable commercial dealing — as might be the case if the bank casually executes doubtful wire transfers with the knowledge that it will never bear liability — the 4A-105/1-203 obligation should abrogate sections 4A-201 through 4A-205. The breach of the universal good faith obligation should prevent the negligent beneficiary's bank from relying on the exculpatory provisions of article 4A.⁵⁵

Beyond questions of good faith, two other 4A sections cast doubts

51. Although a breach of the duty of good faith will probably not support an affirmative cause of action absent a special relationship between the parties, *see, e.g.*, *Trade Indus. Ltd. v. Brogan*, 805 P.2d 54, 61 (Mont. 1991); *cf. Copesky v. Superior Court*, 280 Cal. Rptr. 338, 346, 348 (Ct. App. 1991) (common law contract), § 4A-207's requirements would still conflict with the §§ 4A-105/1-203/3-103 duty, necessitating a choice of which section to effectuate. Because the universal sections of article 1, including § 1-203, cannot be abrogated in favor of others, *see infra* note 55, subordinating the duty of good faith is improper. Negligent behavior would make the bank liable, whether under §§ 4A-105, 1-203, and 3-103 or, more commonly, under § 1-103, *see* ROBERT A. HILLMAN ET AL., *COMMON LAW AND EQUITY UNDER THE UNIFORM COMMERCIAL CODE* ¶ 1.04[3] (1985); *infra* section II.B.

Yet, in comparison, commentators have noted that §§ 1-203 and 3-103 might allow a direct action against a negligent depository bank in a check transaction, an entity in much the same position as the beneficiary's bank in a wire transfer. *See* JAMES J. WHITE & ROBERT S. SUMMERS, *UNIFORM COMMERCIAL CODE* 711-12 (3d ed. 1988) (handling of checks); *see also* *Fireman's Fund Ins. Co. v. Security Pac. Natl. Bank*, 149 Cal. Rptr. 883, 905 (Ct. App. 1978) (negligence action against depository bank "nowhere specifically prohibited by [UCC]").

52. *Cf. Richards v. Platte Valley Bank*, 866 F.2d 1576, 1583 (10th Cir. 1989) (under Uniform Fiduciary Act, bad faith inferable where "facts and circumstances are so cogent and obvious that to remain passive would amount to deliberate desire to evade knowledge").

53. *See* Maroldy, *supra* note 19, at 870 (large amounts provide incentive for banks to ignore potential money-laundering schemes).

54. *See supra* text accompanying note 43. *But see* Spak, *supra* note 3, at 211 (arguing that under § 4A-207, due diligence questions should not arise).

55. The duty of good faith supersedes all other Code requirements. *See* *T.W. Oil, Inc. v. Consolidated Edison Co.*, 443 N.E.2d 932, 937 (N.Y. 1982) (good faith and reasonable standards of fair dealing are "the rule rather than the exception"); *Schroeder v. Fageol Motors, Inc.*, 544 P.2d 20, 24 (Wash. 1975) (en banc) (primacy of good faith duty indicates unconscionability of contract); HILLMAN ET AL., *supra* note 51. The bad faith payment of a wire transfer thus would impose liability on the bank by refusing to allow it to assert that the originator or its bank is liable under 4A. *Cf. Mellon Bank, N.A. v. Securities Fund Settlement Corp.*, 710 F. Supp. 991,

on its consistency towards a negligent beneficiary's bank. Section 4A-404 explicitly protects a beneficiary's bank from consequential damages if the bank withholds payment based on a reasonable doubt of the beneficiary's authority.⁵⁶ In other words, article 4A allows a bank to recognize fraud in some cases but ignore it in others. Finally, section 4A-207(d)(1) grants the customer a right of recovery for name and number fraud⁵⁷ but fails to hold liable the only accessible responsible party,⁵⁸ the beneficiary's bank. The UCC operates at cross-purposes in cases involving a negligent beneficiary's bank.

Moreover, a beneficiary's bank's rights under article 4A might also conflict with federal regulations in such cases. Under Department of Treasury rules, a bank involved in any "deposit, withdrawal, exchange of currency or other payment or transfer" in excess of \$10,000 must acquire certain information from its payee, including the identity of both the payee and beneficiary and the number of the account involved.⁵⁹ Smaller transfers to an individual totalling over \$10,000 also implicate these federal standards.⁶⁰ Even if a bank does not disburse a wire transfer over the counter, it must preserve a record of large credits transferred to an account.⁶¹ Thus the beneficiary's bank *cannot* ignore the circumstances in many of these cases.

The Treasury rules minimize the marginally increased burden to a beneficiary's bank that would accompany a duty to investigate a beneficiary's authority. In cases such as those described in section I.A.1 of this Note, the inquiry should provide information sufficient to meet a duty of ordinary care. The federal requirements also allow easy discovery of a name and number divergence: the beneficiary's bank's employee normally can crosscheck the information on the bank's computer in a matter of seconds. Necessity trumps a beneficiary's

998 (D.N.J. 1989) (bank denied right to reimbursement from transferor bank for negligent failure to cancel payment order).

Article 3 resolves an analogous situation similarly. Where a depository bank pays on an obviously unauthorized instrument, it cannot assert holder-in-due course status under § 3-302(a). The bank in such a case effectively has "notice" from the circumstances of the transaction. See *Wymore State Bank v. Johnson Intl. Co.*, 873 F.2d 1082, 1087 (8th Cir. 1989) (bank that failed to inquire with knowledge of depositor's instability may be sued for negligence); see also U.C.C. § 1-201(25)(c); Howard S. Koh, Note, *Liability for Lost or Stolen Funds in Cases of Name and Number Discrepancies in Wire Transfers: Analysis of the Approaches Taken in the United States and Internationally*, 22 CORNELL INTL. L.J. 91, 108 (1989).

56. U.C.C. § 4A-404(a); see *supra* note 28.

57. U.C.C. § 4A-207(d)(1).

58. *Responsibility* in this Note refers to both unreasonably harmful conduct and failure to prevent loss though best able to do so. See *infra* notes 236-38, 240-44 and accompanying text.

59. 31 C.F.R. § 103.22(a)(1) (1991) (emphasis added); 31 C.F.R. § 103.38 (1991) (extent of information required). In these cases, the thieves would most likely not fall under the "established depositor" exception, see 31 C.F.R. § 103.22(b)(2)(i) (1991), and even if they do, the bank still must acquire information from them, 31 C.F.R. § 103.22(b)(2)(i) (1991).

60. 31 C.F.R. § 103.22(a)(1) (1991).

61. 31 C.F.R. § 103.33(a) (1991).

bank's objection: if the originator and its bank are unaware of the fraud, no party but the beneficiary's bank has the opportunity to prevent the loss. If a bank ignores evidence of the beneficiary's specious authority, its good faith may be suspect.⁶² Through compliance, the bank might even know of a discrepancy between name and number, preventing reliance on section 4A-207 in the first place.⁶³ At the very least, compliance could provide some information for subsequent investigators. Article 4A's provisions flounder in light of these competing standards that federal law already mandates.

Article 4A's loss allocation scheme in these cases bases liability on either an irrelevant and effectively impossible burden of proof or a rationale inapplicable to fraud discovery, while absolving the party best able to prevent the loss.⁶⁴ Article 4A's provisions may conflict with federal regulations as well as reasonable standards of fair dealing. In stark contrast to article 3 and 4 rules, a beneficiary's bank-payor stands free from liability despite the tell-tale signs before it. Given 4A's dictates, a reasonable solution must lie beyond the immediately operative provisions.⁶⁵

B. Negligence Principles in the UCC

1. Reasonableness Reflected in Article 4A

Assuming the beneficiary's bank to be negligent, a court may want to allow a suit where article 4A does not, on its face, satisfactorily assign liability.⁶⁶ The language of the Code would likely support such an action. While 4A's commentary states that "resort to principles of law or equity outside of Article 4A is not appropriate to create rights, duties and liabilities inconsistent with those stated in this Article,"⁶⁷ this Note argues that article 4A's language supports the inference that negligence is not inconsistent with the Code.⁶⁸ Article 4A, while not

62. See *supra* notes 43-52 and accompanying text.

63. See *supra* note 43 and accompanying text.

64. See *supra* text accompanying notes 31, 35; *infra* text accompanying notes 245-47.

65. See Steve H. Nickles, *Problems of Sources of Law Relationships Under the Uniform Commercial Code-Part I: The Methodological Problem and the Civil Law Approach*, 31 ARK. L. REV. 1, 3 (1977) [hereinafter Nickles, *Part I*] (The hard cases requiring resort to other law include "cases in which the language of the statutory provision assumed to be applicable is ambiguous and . . . cases in which the legislation is clear but the result dictated by its application seems unjust.").

66. See James J. White, *Goldstein's Curse*, 21 U. TOL. L. REV. 599, 623 (1990) (noting that, in this type of case, nothing in 4A seems to allow for liability on the negligent beneficiary's bank, though it probably should be held liable); see also McKelvy, *supra* note 5, at 373 ("Article 4A . . . creates uncertainty with regard to the potential liability of banks when an unauthorized transfer occurs in spite of a security procedure but is not caused by the customer.").

67. U.C.C. § 4A-102 cmt.

68. But see A.L.I. PROCEEDINGS, *supra* note 4, at 400 (article 4A is "designed to fill that gap" which caused courts to look to outside sources of law). As section I.B.1 argues, however, negligence is not wholly "outside" 4A, nor are 4A's gaps fully filled. See *supra* section I.A. The

explicitly recognizing a claim against a beneficiary's bank for negligence, does not necessarily preclude it.

Article 4A is a product of compromise,⁶⁹ and seemingly bright-line rules must be read in light of its many flexible principles. Reasonableness principles in 4A indicate a receptiveness to a negligence suit. For example, a bank's security procedure must meet only the nebulous "commercially reasonable" standard to absolve the bank under section 4A-202(a)(i) unless the customer explicitly agreed to a different procedure.⁷⁰ Section 4A-204(a) shifts the loss of interest to a customer who "fails to exercise ordinary care" in reporting an unauthorized and ineffective transfer,⁷¹ much like the comparative negligence standards employed for check liability under article 3.⁷² Furthermore, a party must give reasonable notice to render cancellation of a payment order incontestable by the processing bank.⁷³ In cases where an originator initially authorized a nonetheless erroneous payment order, the bank can be liable on a last-clear-chance theory of contributory negligence if the customer can prove that the bank's failure to follow a commercially reasonable procedure caused the loss; the customer must, in keeping with the negligence theory, use ordinary care in detecting the error.⁷⁴ Additionally, the bank might incur liability for its failure to exercise reasonable commercial standards of fair dealing.⁷⁵

Though article 4A eschews an explicit ordinary care duty as imposed for paper transactions under section 4-104,⁷⁶ there are multiple

resort to common law negligence and the question of displacement are addressed in section II.B, *infra*.

69. A.L.I. PROCEEDINGS, *supra* note 4, at 401 ("As a result [of the many groups necessarily interested in the drafting of article 4A], many of the rules represent compromise provisions, provisions in which there is a good deal of give and take, and in which perhaps nobody is completely happy . . .").

70. U.C.C. § 4A-202(b)-(c). Courts recognized the propriety of a flexible standard even before 4A's promulgation. See, e.g., *Walker v. Texas Commerce Bank, N.A.*, 635 F. Supp. 678, 682 (S.D. Tex. 1986) ("[A] depositor may justifiably expect a bank to implement commercially reasonable internal procedures designed to . . . detect and minimize inaccuracy, and to act promptly and diligently to remedy error . . .").

71. U.C.C. § 4A-204(a); see *Pan Am. World Airlines, Inc. v. MidAtlantic Natl. Bank*, No. 87-3404, 1991 WL 3365, at *4 (D.N.J. Jan. 10, 1991), *aff'd.*, 944 F.2d 898 (3d Cir. 1991) (discussing proposed article 4A in assessing damages); *Baxter & Bhala*, *supra* note 15, at 1497 (describing in tort-law terms the customer's duty to use ordinary care in examining his bank statement).

72. See *infra* notes 90-92 and accompanying text.

73. U.C.C. § 4A-211(b); see *Baxter & Bhala*, *supra* note 15, at 1498.

74. U.C.C. § 4A-205(a) & cmt. 2.

75. See *Baxter & Bhala*, *supra* note 15, at 1497 ("Some cases suggest that the door is open for a court to engage in a 'tort-like' inquiry to ascertain [a bank's reasonable fair dealing]."); *supra* notes 46, 52, 55 and accompanying text. But cf. *Richards v. Platte Valley Bank*, 866 F.2d 1576 (10th Cir. 1989) (discussing a suit for breach of fiduciary duty against a negligent beneficiary's bank and requiring actual knowledge for liability); U.C.C. § 3-103 cmt. 4 (good faith not the same as due care).

76. Carl Felsenfeld, *An Evaluation of Proposed Article 4A: Comment on Professor Geva's Paper*, 14 CAN. BUS. L.J. 235, 238-39 (1988); Wulff, *supra* note 3, at 108.

contacts between tort law concepts and article 4A's provisions.⁷⁷ Where 4A's absolute liability scheme fails to indicate a reasonable solution or where its rationales do not apply, tort law fills the void. An argument might be made that the explicit inclusion of due care and negligence concepts in other articles of the UCC and their partial absence in article 4A suggest that the drafters meant to exclude due care concepts from 4A; they could have more definitely included them, had they wanted to. Article 4A's inclusion of due care concepts, however, mitigates this objection for it severely undercuts the apparent contrast between 4A and the other parts of the Code.

2. Analogies to Other UCC Articles

Other UCC provisions support a negligence standard in certain cases. Under other Code articles, a party in the same position as a beneficiary's bank is normally held to a negligence or reasonableness standard. Of these other Code provisions, negotiable instrument rules most directly illustrate the applicability of negligence law to wire transfers. Furthermore, resorting to articles 3 and 4 in wire transfer cases is not unprecedented. Courts confronting wire transfer issues prior to the adoption of article 4A relied on the law governing negotiable instruments and bank deposits and collections, comparing a wire transfer to a paper instrument.⁷⁸ Courts recognized that many negotiable instruments, such as certified checks or money orders, are analogous to a wire transfer.⁷⁹

The creation of article 4A has attenuated the analogy between checks and wire transfers. The provisions of articles 3 and 4 exclude wire transfers from those articles' explicit due care standard;⁸⁰ a check, admittedly, is distinguishable in several respects. A check is a debit transaction, as opposed to a wire transfer credit transaction.⁸¹ In

77. Baxter & Bhala, *supra* note 15, at 1497 ("The contacts between the law of torts and Article 4A are less salient than those between the law of contracts and Article 4A. Nevertheless, there are several such contacts.").

78. See, e.g., *Bradford Trust Co. v. Texas Am. Bank* — Houston, 790 F.2d 407, 409 (5th Cir. 1986) (wire transfer analyzed under article 3 and 4 principles); *Delbrueck & Co. v. Manufacturers Hanover Trust Co.*, 609 F.2d 1047, 1051 (2d Cir. 1979) (check collection finality rules); *In re Spears Carpet Mills, Inc.*, 86 B.R. 985 (Bankr. W.D. Ark. 1987), *aff'd*, 85 B.R. 86 (W.D. Ark. 1988); cf. Benjamin Geva, *The Evolving Law of Payment by Wire Transfer — An Outsider's View of Draft Article UCC 4A*, 14 CAN. BUS. L.J. 186, 203 (1988) (recognizing that no provision of then-proposed article 4A explicitly imposed a duty of due care). But see *Evra Corp. v. Swiss Bank Corp.*, 673 F.2d 951, 955 (7th Cir.), *cert. denied*, 459 U.S. 1017 (1982) (common law, not article 4, guides court); *Shawmut Worcester County Bank v. First Am. Bank & Trust*, 731 F. Supp. 57, 63 (D. Mass. 1990) (court looks to proposed article 4A instead of articles 3 and 4).

79. See *Richards*, 866 F.2d at 1580 ("The transfer of funds by cable or telegraph is in law a check."); *Illinois ex rel. Lignoul v. Continental Ill. Natl. Bank*, 536 F.2d 176, 178 (7th Cir.), *cert. denied*, 429 U.S. 871 (1976) (ATM transaction treated as check). A money order closely resembles a check, see *Thompson v. Lake County Natl. Bank*, 353 N.E.2d 895, 897 (Ohio 1975); U.C.C. § 3-104(f) & cmt. 4, and so also parallels the analogous wire transfer.

80. See U.C.C. §§ 3-102(a), 4-104(a)(9).

81. See U.C.C. § 4A-104 cmt. 4. A checkwriter draws on its bank and when the payee

a check transaction, the paying bank is the first link in the collection chain. Further, wire transfers usually involve much greater amounts⁸² and are designed to move funds at high speed and low cost between sophisticated parties.⁸³ A check is slower as a function of its paper form and includes a record, through indorsements, of where it has traveled.

But attributes common to both checks and wire transfers outweigh the differences. Wire transfers resemble checks in the ultimate payment process: a party issues a check or a wire to be paid by a distant bank in most cases, which then relies upon collection from the issuer *back up the chain*. Both checks and wire transfers are demands to pay cash, often enforced in person by the supposed beneficiary. Their form speeds payment and eases the transfer of funds. A cashier's check or certified check substantially equals cash⁸⁴ and therefore functions like a paper wire transfer. Nor is article 4A divorced from the paper system: funds transfers may be made through a paper payment order⁸⁵ or may accompany a check or other negotiable instrument or may even be effectuated through a negotiable instrument.⁸⁶ The claim for comparable analysis should apply even more forcefully to paper funds transfers, which most closely resemble checks. Disparate standards for electronic transfers would then require justification — a difficult proposition, given that article 4A treats paper funds transfers and electronic transfers identically.⁸⁷

The similarity between wire transfers and checks indicates that the provisions of articles 3 and 4 may guide by analogy.⁸⁸ Under these

cashes the check the account is debited. A wire transfer originator, in contrast, sends *funds* — a credit — and the payee need not enforce payment or debit as with a check.

82. A.L.I. PROCEEDINGS, *supra* note 4, at 399 ("The average wire transfer is in excess of \$2,000,000."). The average check amount has been estimated at \$570. See Hal S. Scott, *Corporate Wire Transfers and the Uniform New Payments Code*, 83 COLUM. L. REV. 1664, 1664 (1983).

The larger amounts involved in wire transfers, however, would argue in favor of a beneficiary's bank's liability. Because there will be no further review of the beneficiary's authority once the payment is released, a beneficiary's bank is the final defense against the thief. Koh, *supra* note 55, at 110. In check forgery cases, the drawee bank may at least verify the signature, as it usually will for large enough amounts, see WHITE & SUMMERS, *supra* note 51, § 6-17, at 713, and the drawer-account holder similarly may review the checks monthly. See, e.g., U.C.C. § 4-406(a) (except for truncated accounts).

83. Robert G. Ballen & Natalie H. Diana, *The Need for Article 4A*, 45 BUS. LAW. 1399, 1399-1400 (1990); see also Jeffrey S. Tallackson & Norma Vallejo, *International Commercial Wire Transfers: The Lack of Standards*, 11 N.C. J. INTL. L. & COM. REG. 639, 643 (1986).

84. A bank issuing a certified or cashier's check "accepts" liability for the instrument, see U.C.C. §§ 3-413 (acceptance), 3-409 (certified check), 3-412 (cashier's check), thereby guaranteeing payment.

85. U.C.C. § 4A-103(a)(1).

86. U.C.C. § 4A-104 cmt. 5; see also U.C.C. art. 4A Prefatory Note.

87. See U.C.C. § 4A-104 cmt. 6.

88. WRIGHT, *supra* note 12, § 13.1; see Nickles, *Part I*, *supra* note 65, at 9 ("[§ 1-102] sanctions . . . reasoning by analogy").

related articles, liability already rests on a failure to use reasonable care.⁸⁹ A comparative negligence framework in articles 3 and 4 allocates losses resulting from forged instruments between the party which accepted the forgeries and the one which should have been able to prevent the loss by discovering the thefts.⁹⁰ Reasonableness of behavior determines liability repeatedly in several comparable negotiable instrument cases: Article 3 precludes a negligent check drawer from suit;⁹¹ where suspicious circumstances arise, a bank may be liable for its failure to exercise due care;⁹² and if the facts indicate an obvious fraud, an instrument's taker may have notice under article 3, precluding holder-in-due-course status.⁹³ Finally, articles 3 and 4 often pre-

89. To be sure, article 4 disclaims any duty of ordinary care with respect to payment orders. U.C.C. § 4-103; see also U.C.C. §§ 4A-202, 4A-104(a); *supra* text accompanying note 80. The hypothetical thefts this Note discusses, however, present a unique issue. The beneficiary's bank did not mishandle an *authorized* payment order as under the traditional article 4 standard for checks — the beneficiaries or accounts described in the order received their money. Rather, loss resulted from the bank's unreasonable conduct which facilitated the fraud. In such cases, article 4's exclusion of payment orders from its ordinary care duty should not bear upon the general applicability of a duty of ordinary care to wire transfers. Besides, this Note does not suggest that article 4 should control these cases, only that article 3 and 4's principles suggest a superior result than article 4A and that articles 3 and 4 are not so far removed as to be irrelevant.

90. See U.C.C. §§ 3-404, 3-405, 3-406. Section 3-405 comment 4 states, after providing an example where a forged check is deposited in an unauthorized account and then the funds *withdrawn by wire transfer*, that "[t]he trier of fact could find that Depository [and here, beneficiary's] Bank did not exercise ordinary care and that the failure to exercise ordinary care contributed to the loss suffered." See also *Walker v. Texas Commerce Bank, N.A.*, 635 F. Supp. 678, 682 (S.D. Tex. 1986) ("[T]he statement of a claim in negligence [against a beneficiary's bank] is consistent with the explicit language of various provisions of the U.C.C." (citing U.C.C. §§ 3-419, 4-202, 4-203, 4-406)).

91. U.C.C. § 3-406.

92. *E.g.*, *Wymore State Bank v. Johnson Intl. Co.*, 873 F.2d 1082, 1086 (8th Cir. 1989) (bank's knowledge of depositor-embezzler's financial instability); *AmSouth Bank v. Spigener*, 505 So. 2d 1030, 1038-39 (Ala. 1986) (where "circumstances surrounding [the] transaction . . . dr[aw] [a] check into question," depository bank should investigate). See generally John W. Hinchey, *An Analysis of Bank Defenses to Check Forgery and Alteration Claims Under Uniform Commercial Code Articles 3 and 4: Claimants' Negligence and Failure to Give Notice*, 10 PEPP. L. REV. 1, 11 (1982) (suspicious circumstances in check forgeries require bank to act according to "reasonable commercial standards"); White, *supra* note 66, at 605 (describing case where check forger appeared at a bank with a bottle of champagne to encourage the bank's officers to pay the funds he sought).

Courts have considered the same principle in wire transfer cases. See, e.g., *Shawmut Worcester County Bank v. First Am. Bank & Trust*, 731 F. Supp. 57, 64 (D. Mass. 1990) (suggesting that liability may be appropriate where bank was "put on notice that the transaction was . . . irregular"). Looking to article 4A for guidance, the court in *Shawmut* recognized that "[a]s a practical matter, the [beneficiary's] bank probably is in a better position to recover the funds from the beneficiary, especially where the beneficiary is a customer." 731 F. Supp. at 64. In the cases this Note discusses, the beneficiary's bank deals with the thieves and should at least bear some responsibility where, as in *Shawmut*, it "blithely executes payment orders without exercising even ordinary care." 731 F. Supp. at 64; cf. *Richards v. Platte Valley Bank*, 866 F.2d 1576, 1578, 1583 (10th Cir. 1989) (no duty actively to inquire in suit for breach of fiduciary duty, but may not ignore obvious signs of fraud); *FDIC v. Imperial Bank*, 859 F.2d 101, 103 (9th Cir. 1988) (no duty to inquire where circumstances would not have aroused suspicion); *Walker*, 635 F. Supp. at 682 (duty to inquire in pre-4A wire transfer derived from implied contract between bank and customer).

93. U.C.C. § 3-302(a)(1); see *supra* note 55.

sume that the party who actually dealt with the thief is best able to prevent the loss and hold it liable.⁹⁴

This article 3 and 4 loss-allocation scheme suggests that in the similar situation involving wire transfer loss, a court should not ignore the beneficiary's bank. In the wire transfer fraud cases where the originator and the originator's bank are innocent, the beneficiary's bank is analogous to the acceptor of the forgery and is the party best able to prevent loss. Failure to hold the beneficiary's bank liable would sanction, or at least not discourage, disregard of federal reporting regulations. Further, in these wire transfer cases, the beneficiary's bank is also the most comparatively negligent party, the one presented with suspicious circumstances, the one who actually and *finally* dealt with the thief. UCC liability frequently rests upon loss-prevention cost, as in much of negligence law.⁹⁵ The beneficiary's bank's negligent payment of a wire transfer fits all the liability criteria had the transaction been a paper one.

Objections to liability for the beneficiary's bank include the potential increase in cost and decrease in speed.⁹⁶ However, the allowance for paper funds transfers and the mandatory federal inquiries undermine these claims. Furthermore, a limited duty for the bank should not significantly complicate these transactions. The beneficiary's bank need inquire or refuse to pay only where it is reasonably aware of a danger. The facts surrounding a single transfer, such as the behavior of the beneficiary or the amount of a transfer to an unknown customer, can alert the bank. Alternatively, multiple transfers to an individual the bank should know, through common knowledge or its own inquiry, is either involved in criminal activity or suffering financially should call the bank's attention to a possible fraud. Repeated discrepancies between payment orders' facial directions and the actual account that receives the money similarly should warn the bank just as they commonly do in check cases.

When the duty arises, confirmation or approval from the origina-

94. See U.C.C. §§ 3-417 (successive presentment warranty suits over a forged instrument would follow the chain of transfer to hold the one who took from the thief liable), 3-420 cmt. 1 (under presentment warranty action, where a drawee sues the depository bank, "[t]he loss will fall on the person who gave value to the thief for the check"), 3-307(b) (notice to bank of breach of fiduciary duty places loss on depository bank), 3-404 cmt. 3 (fictitious payee) ("[A] drawer [who draws a check upon inducement by an impostor] is in the best position to avoid the fraud and thus should take the loss."), 3-405 cmt. 1 (liability of negligent employer for acts of embezzling employee) ("[T]he employer is in a far better position to avoid the loss by care in choosing employees, in supervising them, and in adopting [security procedures]."), 4-207 to 4-208 (as in article 3's warranties, the parties would sue their transferors until the one who took from the thief is left liable).

95. See, e.g., *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947), where Judge Learned Hand articulated his now-famous definition of negligent behavior: where the cost of prevention not undertaken is less than the potential loss reduced by its probability of occurrence, a party is liable.

96. See U.C.C. art. 4A Prefatory Note.

tor or its bank should fulfill the duty.⁹⁷ Once the beneficiary's bank notifies the originator's bank of its doubts, the originator's bank can contact its customer for more information: Who is this person? Do you normally make repeated transfers like this to an account at the beneficiary's bank? Does the amount sound right? Responsibility then would rest with the potential victim, on whom the beneficiary's bank can rely for instructions. A duty on the beneficiary's bank would arise only in the limited number of cases where a reasonable bank would question the authenticity of the payments. The bank will often already have the information and will not need to make any further inquiry than that described above. The final determination in a given case would be for the jury, which could weigh the actual burden and decide whether a reasonable bank would have inquired further, subject to judicial control.

A reasonable care duty would not hamper the processing of funds transfers to an extent great enough to deny the duty.⁹⁸ After all, the checking system seeks to move funds quickly, but negligence principles still apply to check handling.⁹⁹ These two similar Code systems need not be treated radically differently.

Analogy to two other apposite UCC articles, 5 (Letters of Credit) and 7 (Warehouse Receipts), initially suggests a more relaxed standard for the beneficiary's bank than a duty of reasonable care. Both articles provide for disposition of goods or funds on the mere appearance of documentary proof, regardless of the reality of the authorization. Under section 5-109(2), a bank need only "ascertain that on their face [documents presented under a letter of credit] appear to comply with the terms of the credit." If they do, a bank must pay the letter's presenter despite his actual authority. Through section 7-403, a holder of a document evidencing the right to delivery may claim warehoused goods even if he is not the true owner. In these cases, the bank or warehouseman must release funds or goods to the party analogous to the beneficiary in a wire transfer without concern for his legitimacy. These article 5 and 7 rules seemingly indicate that a beneficiary's bank should bear no duty to inquire or question the beneficiary's authority.

Due care or analogous principles, however, also limit article 5 and 7's apparently strict requirements. Consider letter of credit transac-

97. In large transactions a bank currently must verify the payee's identity. See *supra* notes 59-61 and accompanying text.

98. See Koh, *supra* note 55, at 112 (arguing that, "[c]onsidering the potential vulnerabilities of the wire transfer system, it would not be unduly burdensome for the last bank in the chain of messages to make a final check," but suggesting payment by number). But cf. Esposito, *supra* note 5, at 94 (arguing that the UCC rules governing check transactions and their corresponding duty are "unwarranted" for wire transfers); see French, *supra* note 15, at 1426 (noting the concern, during the drafting of 4A, about potential delays).

99. See, e.g., 12 C.F.R. § 229.38(a) (1992) ("A bank shall exercise ordinary care and act in good faith in complying with [check collection] requirements."); *supra* notes 90-94 and accompanying text.

tions, where the bank must still act in good faith and observe general banking norms, examining documents with care to ensure authenticity.¹⁰⁰ Also, a warehouseman, akin to the beneficiary's bank in a wire transfer, must act in good faith and observe standards of a "reasonably careful man" in the same circumstances or face liability.¹⁰¹ Negligence standards surface repeatedly in these other UCC articles.

The principles of negligence liability sprinkled throughout article 4A, supplemented by their use in situations analogous to wire transfers in articles 3, 4, 5, and 7, strongly imply that negligence is not incompatible with article 4A. The party parallel to the beneficiary's bank in these other articles would incur liability for its negligence. But 4A's disquieting operation — liability on innocent parties unable to prevent losses, release of the most unreasonable actor, and internal Code contradiction — suggests that a coherent application of due care concepts requires resort to law outside the UCC.¹⁰² Whether courts may look to the common law of negligence, however, depends on the extent to which article 4A displaces its principles.

II. EXPLICIT AND IMPLICIT INCORPORATION OF EXTRA-CODE NEGLIGENCE LIABILITY

This Part examines how the common law and regulatory systems apart from the UCC determine liability for the negligent payment of a fraudulent wire transfer and whether the Code displaces or incorporates this extra-Code framework. Section II.A.1 discusses the law applied to wire transfers before the enactment of article 4A, including both common law principles and occasional judicial references to articles 3 and 4. Section II.A.2 explains the regulatory framework and local practices accepted by UCC section 4A-501(b) which support the application of negligence. Section II.B examines courts' and commentators' analyses of UCC section 1-103's inclusion of extra-Code law and derives a section 1-103 framework to determine the state of negligence liability after article 4A. This Part concludes that 4A does not clearly displace common law negligence liability. Further, this Part maintains, article 4A's incorporation of the regulatory framework and

100. U.C.C. § 5-109(1)-(2).

101. U.C.C. § 7-204(1).

102. *Cf.* Tallackson & Vallejo, *supra* note 83, at 665 (arguing that the common law's flexibility may be desirable and has not yet paralyzed the electronic banking system, but also recommending certainty). *But see* Baxter & Bhala, *supra* note 15, at 1507 ("[T]he draftspersons sought to control carefully the contacts which Article 4A would have with other bodies of law. . . . The unintended importation of a common law doctrine would upset that balance, just like a foreign bacteria can adversely affect a healthy organism.").

Not only do several provisions in 4A support negligence liability, this Note argues that such a standard is necessary in these cases to remedy the harsh and questionable results 4A apparently requires — that is, if 4A can be applied consistently at all. *See supra* section I.A.3.

section 1-103's common law supplementation of the UCC sanction a negligence action against a beneficiary's bank.

A. *Extra-Code Law*

The UCC includes two avenues to extra-Code law. Article 4A itself contemplates non-Code banking regulations and section 1-103 allows for consideration of common law and equitable principles. This section discusses extra-Code law particularly relevant to a beneficiary's bank's handling of a wire transfer. The section first considers common law principles articulated prior to 4A's enactment; it then examines negligence-like reasonableness concepts in the regulatory framework in which wire transfers occur. This section concludes that this extra-4A law lends support to the application of negligence law to parties nominally covered by article 4A.

1. *Pre-4A Wire Transfer Liability*

Wire transfers, and questions of liability, existed well before article 4A. Reasonable-care principles frequently determined responsibility. Many courts turned to common law theories, particularly negligence, to resolve disputes involving erroneous or unauthorized wire transfers.¹⁰³ In *Evra Corp. v. Swiss Bank Corp.*,¹⁰⁴ the Seventh Circuit upheld negligence liability for the mishandling of a wire transfer, denying recovery only as to consequential damages. Other courts have raised issues of due care under other common law theories, such as breach of

103. See, e.g., *FDIC v. Imperial Bank*, 859 F.2d 101, 103 (9th Cir. 1988) (denying liability of beneficiary's bank on proximate cause grounds under state tort law); *Evra Corp. v. Swiss Bank Corp.*, 673 F.2d 951, 957-59 (7th Cir.), cert. denied, 459 U.S. 1017 (1982) (denying consequential damages for mishandled wire transfer but accepting application of common law negligence theory); *Shawmut Worcester County Bank v. First Am. Bank & Trust*, 731 F. Supp. 57, 64 (D. Mass. 1990) ("The issue before the Court . . . is whether [the beneficiary's bank] was somehow put on notice that the transaction was so irregular that it should have investigated the circumstances prior to crediting the account . . . [Liability may attach where a bank] blithely executes payment orders without exercising even ordinary care."); *Walker v. Texas Commerce Bank, N.A.*, 635 F. Supp. 678, 682-83 (S.D. Tex. 1986) (negligence suit against bank for erroneous handling of payment order under implied contract to use ordinary care); *Securities Fund Servs., Inc. v. American Natl. Bank & Trust Co.*, 542 F. Supp. 323, 327 (N.D. Ill. 1982) (denial of summary judgment; complaint stated adequate claim in negligence); *Nagle v. LaSalle Natl. Bank*, 472 F. Supp. 1185, 1190-91 (N.D. Ill. 1979) (denial of summary judgment where genuine issue of material fact existed); *Central Coordinates, Inc. v. Morgan Guar. Trust Co.*, 494 N.Y.S.2d 602, 604 (Sup. Ct. 1985) ("[F]ailure to transfer funds . . . in a reasonably prompt manner can result in . . . damages . . ."); see also DONALD I. BAKER & ROLAND E. BRANDEL, *THE LAW OF ELECTRONIC FUND TRANSFER SYSTEMS*, ¶ 29.03[2][d] (2d ed. 1988).

104. 673 F.2d 951 (7th Cir.), cert. denied, 459 U.S. 1017 (1982).

fiduciary duty,¹⁰⁵ agency,¹⁰⁶ and contract.¹⁰⁷ The theory of equitable negligence also supported pre-4A negligence liability.¹⁰⁸ Equitable negligence seeks after the fact "to place responsibility for a loss on the party best able to prevent the harm."¹⁰⁹ The party more at fault bears the loss under what is essentially a modified comparative negligence scheme.¹¹⁰ Wire transfers were not alien to the common law before 4A.

Courts have also looked to articles 3 and 4 — with the resulting importation of due care — in wire transfer cases, treating wire transfers as instruments.¹¹¹ For example, in *Delbrueck & Co. v. Manufacturers Hanover Trust Co.*,¹¹² the Second Circuit analogized acceptance of a payment order to final payment of a check. In cases involving liability on negotiable instruments themselves, in many ways comparable to electronic funds transfers,¹¹³ courts accepted the application of negligence principles.¹¹⁴ Before article 4A, courts employed these

105. *Richards v. Platte Valley Bank*, 866 F.2d 1576 (10th Cir. 1989).

106. *Delbrueck & Co. v. Manufacturers Hanover Trust Co.*, 609 F.2d 1047, 1051-52 (2d Cir. 1979) (negligence standard applied under implied agency); see also *Shawmut*, 731 F. Supp. at 63 (examining agency theory but determining that beneficiary's bank would not be liable under such a cause of action); Geva, *supra* note 78, at 190-91 (describing the potential agency liability of a party to an EFT, but uncertain as to beneficiary's banks); cf. *Childs v. Federal Reserve Bank*, 719 F.2d 812, 814 (5th Cir. 1983) (agency in check collection).

107. *Mellon Bank, N.A. v. Securities Settlement Corp.*, 710 F. Supp. 991, 998 (D.N.J. 1989) (bank liable for breach of contract to use ordinary care in handling of wire transactions); accord *Walker*, 635 F. Supp. at 683.

108. See, e.g., *First Bank of N.D. (N.A.) — Jamestown v. Pillsbury Co.*, 801 F.2d 1036 (8th Cir. 1986) (sale of goods financed by security interest).

109. *Pillsbury*, 801 F.2d at 1039.

110. See Robert S. Summers, *General Equitable Principles Under Section 1-103 of the Uniform Commercial Code*, 72 Nw. U. L. REV. 906, 918 (1978). This Note discusses the importance of this principle as an equitable remedy, as opposed to an action at law, *infra* at text accompanying note 167.

111. *Bradford Trust Co. v. Texas Am. Bank — Houston*, 790 F.2d 407, 409 (5th Cir. 1986) (electronic funds transfer analyzed as paper transaction); *Delbrueck & Co. v. Manufacturers Hanover Trust Co.*, 609 F.2d 1047, 1051 (2d Cir. 1979) (analogy to acceptance of and liability for checks "would support" court's wire transfer analysis); *Evra Corp. v. Swiss Bank Corp.*, 522 F. Supp. 820, 828 (N.D. Ill. 1981), modified, vacated in part, *revd. in part*, 673 F.2d 951, 955 (7th Cir.), cert. denied, 459 U.S. 1017 (1982) (analogy to collecting bank's duty of due care); *Miracle Hills Ctr. Ltd. Partnership v. Nebraska Natl. Bank*, 434 N.W.2d 304, 306 (Neb. 1984). But see *Evra Corp. v. Swiss Bank Corp.*, 673 F.2d 951, 955 (7th Cir.), cert. denied, 459 U.S. 1017 (1982) (rejecting applicability of article 4); *Walker*, 635 F. Supp. at 681 (same); Koh, *supra* note 55, at 107 (some courts relied solely on common law).

112. 609 F.2d 1047 (2d Cir. 1979).

113. See *supra* text accompanying notes 79, 84-86.

114. See, e.g., *Wymore State Bank v. Johnson Intl. Co.*, 873 F.2d 1082, 1087 (8th Cir. 1989); *New Jersey Bank, N.A. v. Bradford Sec. Operations, Inc.*, 690 F.2d 339, 345, 347 (3d Cir. 1982) (negligent transferor of security may be liable); *AmSouth Bank, N.A. v. Spigener*, 505 So. 2d 1030, 1036 (Ala. 1986); *Thompson v. Lake County Natl. Bank*, 353 N.E.2d 895, 897 (Ohio 1975) (negligent cashing of money order); cf. *Western Union Tel. Co. v. Cosby*, 99 S.W.2d 662, 664 (Tex. Civ. App. 1936) (accepting applicability of negligence in failure to identify telegraph recipient but finding no tort in instant case).

UCC concepts in addition to law and equity principles to hold the negligent party responsible.

Concededly, the enactment of 4A makes this pre-1989 case law suspect. First, these cases are of limited value, because any court deciding the same question today would examine article 4A, which might dictate or suggest a different result. Second, because the cases applying common law or other extra-Code theories of liability are admittedly few, they form a patchwork liability system¹¹⁵ when compared to the new UCC article. However, the drafters of article 4A acted in a legal context which included the common law,¹¹⁶ so the prior law of wire transfers helps explicate the drafters' intent and the meaning of article 4A's provisions. In addition, the fact that a decision preceded article 4A is much less relevant if the Code article did not displace the cause of action.¹¹⁷ If 4A incorporates the extra-Code liability, a court should not disregard the extra-Code principles, despite the fragmentary or nonuniform nature of the prior law alone.

2. *Incorporation of the Regulatory Framework*

Within the rules established by the many wire transfer networks, negligence-like or fault-based liability survives. Fedwire¹¹⁸ rules provide that a sending bank that fails to use due care in discovering an unauthorized payment order will not receive interest damages if it seeks repayment.¹¹⁹ CHIPS¹²⁰ places the loss on the party at whose

115. See *Bradford Trust*, 790 F.2d at 408 (district court below had "no well-defined body of law that clearly applied to resolve [wire transfer] case"); *Shawmut Worcester County Bank v. First Am. Bank & Trust*, 731 F. Supp. 57, 62 (D. Mass. 1990); see also A.L.I. PROCEEDINGS, *supra* note 4, at 400; Benner, *supra* note 5, at 241 (the common law and article 4 "have proved inadequate" for liability determinations); Geva, *supra* note 78, at 193; Ernest T. Patrikis et al., *Article 4A: The New Law of Funds Transfers and the Role of Counsel*, 23 UCC L.J. 219, 223 (1991); Scott, *supra* note 82, at 1678 (discussing never-adopted Uniform New Payments Code and state of case law through 1982).

116. Cf. Nickles, *Part I*, *supra* note 65, at 9-10 (original UCC enacted with extant common law in mind).

117. See *infra* section II.B.

118. Fedwire is the Federal Reserve electronic funds transfer system. See 12 C.F.R. § 210 (1992).

119. 12 C.F.R. § 210.28(c) (1992). In several other respects, the regulations apply 4A's framework to Federal Reserve Banks, except where inconsistent with other Fedwire provisions. See 12 C.F.R. § 210.25(b).

120. CHIPS is the Clearing House Interbank Payment System, based in New York, which processes EFTs between U.S. and foreign banks. BAKER & BRANDEL, *supra* note 103, ¶ 1.03[9], at 1-29; see also Wulff, *supra* note 3.

location the fraud occurred,¹²¹ though SWIFT¹²² system rules do not govern liability between participants.¹²³ But most significantly for due care concepts, regional banking practices and local automated clearing house (ACH) rules also govern liability. Each of the 29 regional ACHs may have its own distinct rules,¹²⁴ and courts have considered compliance with these local rules in determinations of negligence liability.¹²⁵ In the regulatory framework outside article 4A, negligence or quasi-negligence principles often govern parties' behavior.

Article 4A directly adopts the fault-based liability rules of these private wire transfer networks. Under section 4A-501(b)(ii), unless article 4A provides otherwise, "a funds-transfer system rule governing rights and obligations between participating banks . . . may be effective even if the rule conflicts with [4A]." Hence, a bank's failure to comply with its ACH rules may result in liability regardless of the outcome under article 4A. Where these rules establish standards of ordinary care, courts will incorporate negligence into article 4A.

Further, the federal reporting requirements impose national standards and therefore a uniform measure of regulatory due care. A bank that disregards the Treasury rules which do not directly create a negligence action deviates from the socially demanded norm — like any other tortfeasor. Given the looming federal requirements and the many individual ACH liability frameworks, a negligence action appears consonant with the regulations governing wire transfers.¹²⁶ Thus both regulatory standards and the prior case law support a com-

121. Robert C. Effros, *A Banker's Primer on The Law of Electronic Funds Transfers*, 105 BANKING L.J. 510, 517 (1988); Esposito, *supra* note 5, at 81. The C.H.I.P.S. determination thus requires locating the place of the fraud. The most reasonable conclusion is that fraud occurs at the beneficiary's bank, because the only face-to-face contact likely occurs there, and damages are not incurred until the beneficiary's bank releases the funds. At any other location, there is no human interaction directly and *finally* resulting in payment.

122. SWIFT, the Society for Worldwide International Funds Transfers, handles international transfers. BAKER & BRANDEL, *supra* note 103, ¶ 1.03[9], at 1-28.

123. *Id.*; Esposito, *supra* note 5, at 81.

124. BAKER & BRANDEL, *supra* note 103, ¶ 19.02.

125. See, e.g., Mellon Bank, N.A. v. Securities Settlement Corp., 710 F. Supp. 991, 996 & n.5 (D.N.J. 1989) (analyzing local rules to determine standard of care); *In re Spears Carpet Mills*, 86 B.R. 985, 993 (Bankr W.D. Ark. 1987), *aff'd*, 85 B.R. 86 (W.D. Ark. 1988) (local settlement rules).

126. Cf. French, *supra* note 15, at 1441 (regulations outside 4A do not directly alter rights of nonbank sender but may do so indirectly by affecting banks). Some courts refuse to recognize the regulations' impact. See, e.g., *Shawmut Worcester County Bank v. First Am. Bank & Trust*, 731 F. Supp. 57, 63 (D. Mass. 1990) ("[T]he regulatory framework that undergirds the parties' relationship cannot support the conclusion that the receiving bank is an agent for the sender charged with a duty broader than simply to credit promptly the beneficiary's account."). 4A's framework, however, explicitly extends beyond mere blind payment. For example, federal reporting requirements override any inconsistent article 4A provisions. See U.C.C. § 4A-107.

These various openings to negligence liability are not necessarily error; they may, in the end, facilitate the development of EFT law. See Tallackson & Vallejo, *supra* note 83, at 665; see also *infra* notes 221-23 and accompanying text.

mon law suit against a negligent beneficiary's bank. The next section addresses the question of displacement of pre-4A common law.

B. *Section 1-103 and Survival of Pre-Code Common Law*

Article 1 provides the potential conduit for this pre-4A common law. Section 1-103 implicitly acknowledges that no attempt at a comprehensive delineation of rights can be perfect.¹²⁷ Section 1-103 opens the door to both common law and equity, allowing resort to extra-Code law "[u]nless displaced by the particular provisions of [the UCC]. . . . [A]ll supplemental bodies of law [continue to apply] except insofar as they are explicitly displaced."¹²⁸ While some commentators favor reading the "explicitly" requirement out of section 1-103,¹²⁹ its inclusion suggests that the mere existence of UCC rules in the relevant area should not alone support a claim of displacement. Unfortunately, conflicting visions of the drafters' intent¹³⁰ limit the legislative history's efficacy as an interpretive tool.

1. *Judicial Analysis of Section 1-103*

Despite the uncertainty surrounding section 1-103, several cases suggest a framework for displacement analysis. Starting from the principle that courts should narrowly construe statutes in derogation of the common law,¹³¹ courts have looked to the common law where

127. The section provides:

Unless displaced by the particular provisions of this Act, the principles of law and equity, including the law merchant and the law relative to capacity to contract, principle and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, or other validating or invalidating cause shall supplement its provisions.

U.C.C. § 1-103. Comment 3 clarifies the scope of the section:

The listing given in this section is merely illustrative; no listing could be exhaustive. Nor is the fact that in some sections particular circumstances have led to express references to other fields of law intended at any time to suggest the negation of the general application of the principles of this section.

U.C.C. § 1-103 cmt. 3.

128. U.C.C. § 1-103 & cmt. 1.

129. See HILLMAN ET AL., *supra* note 51, ¶ 1.04[2]. Despite this objection, some courts have held that explicit displacement is indeed needed. Steven B. Dow & Nan S. Ellis, *The Payor Bank's Right to Recover Mistaken Payments: Survival of Common Law Restitution Under Proposed Revisions to Uniform Commercial Code Articles 3 and 4*, 65 IND. L.J. 779, 798 & n.85 (1990) (citing cases).

130. Compare Robert A. Hillman, *Construction of the Uniform Commercial Code: U.C.C. Section 1-103 and "Code" Methodology*, 18 B.C. INDUS. & COM. L. REV. 655, 683 (1977) (§ 1-103's legislative history suggests the section "to be a narrow outlet to common law") with Summers, *supra* note 110, at 911 ("It is fortunate that the Code drafters saw our general problem [of inequitable operation of the UCC in certain cases] so clearly."), and at 935 (noting that previous versions of § 1-103 had a narrower scope and language than the section as actually enacted).

131. See Dow & Ellis, *supra* note 129, at 798 n.85 (citing Norfolk Redev. & Hous. Auth. v. Chesapeake & Potomac Tel. Co., 464 U.S. 30, 35-36 (1983) (federal eminent domain law's usurpation of state common law principles limited; statutes with "roots" in the common law will not repeal it unless clear and explicit for this purpose)); see also *Demos v. Lyons*, 376 A.2d 1352, 1357 (N.J. Super. Ct. 1977) ("[The UCC] cannot displace [a] common law [action] by implication from silence."). But see Steve H. Nickles, *Problems of Sources of Law Relationships Under*

its application does not explicitly conflict with the UCC and where other provisions of the Code support the common law principle in question.¹³² Courts will resort to section 1-103 where "gaps in Code provisions" exist due to either Code silence or "incomplete Code treatment," or where "broad or ambiguous use of terminology by the Code framers" leaves a court uncertain of the result.¹³³ The outside law may coexist with the Code remedy¹³⁴ or even expand the UCC if it fails to provide a remedy for an otherwise cognizable harm.¹³⁵ The "overlapping nature of the two theories,"¹³⁶ one Code and one common law, provides an additional consideration: if UCC liability requires elements identical to those that constitute the common law cause of action, the Code potentially displaces the common law.

Courts also analyze the scope of the UCC. Where the Code explicitly provides for results in all potential cases, the common law probably does not apply.¹³⁷ Finally, the common law theory advanced

the Uniform Commercial Code — Part II: The English Approach and a Solution to the Methodological Problem, 31 ARK. L. REV. 171 (1977) [hereinafter Nickles, *Part II*] (UCC was meant to displace more broadly the common law than statutes normally are considered to have done).

That a court should broadly construe a comprehensive statute such as the UCC might be advanced to counter the incorporation of common law theories. But the drafters themselves undercut this argument by including § 1-103 as one of the Code's basic principles. Had the drafters sought total, absolute displacement of the common law, § 1-103 would not exist.

132. *E.g.*, Walker v. Texas Commerce Bank, N.A., 635 F. Supp. 678, 682 (S.D. Tex. 1986).

133. Hillman, *supra* note 130, at 673, 666; *see* Nickles, *Part I*, *supra* note 65, at 9; *see also* Stocking v. Transam Distrib. Servs., Inc., No. 83 C 6122, 1985 WL 6226, at *4 (N.D. Ill. Feb. 12, 1985) (unpublished opinion) (§ 7-204 reasonable care provision does not displace negligence but merely guides its application). "Where the UCC does not address an issue, one should refer to the common law for guidance." *Elizarraras v. Bank of El Paso*, 631 F.2d 366, 376 (5th Cir. 1980) (suit by drawer after bank's failure to pay check following erroneous stop-order).

134. *See, e.g.*, Hecker v. Ravenna Bank, 468 N.W.2d 88, 95 (Neb. 1991) (common law supplements § 3-419 conversion action); Robbins v. First Fed. Sav. Bank, 363 S.E.2d 418, 421 (S.C. Ct. App. 1987) (interest on damages not displaced where allowed under common law conversion theory).

135. *See* McNulty v. Great Am. Ins. Co., 727 F. Supp. 45, 49 (D. Mass. 1989) (common law conversion not displaced where § 3-419 not "directly applicable"); Great Am. Ins. Co. v. American State Bank, 385 N.W.2d 460, 462-64 (N.D. 1986) (common law, through § 1-103, extends the parameters of § 3-419 conversion to include instrument with missing indorsement as well as forged indorsement).

136. *E.g.*, Equitable Life Assurance Socy. v. Okey, 812 F.2d 906, 909 (4th Cir. 1987); *see* Berthot v. Security Pac. Bank, 823 P.2d 1326, 1328 (Ariz. Ct. App. 1991) (UCC conversion, in providing for specific remedy for payee, displaces negligence action against depository bank); F & P Builders v. Lowe's of Tex., Inc., 786 S.W.2d 502, 503 (Tex. Ct. App. 1990) (§ 2-709(a)(1) action for the price supplants common law duty to mitigate damages through retrieving goods from a buyer unable to pay; Code provides specific remedy which allows seller to absolutely avoid repossession). *But see* Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Devon Bank, 702 F. Supp. 652, 660 (N.D. Ill. 1988) (holding that § 4-202 does not displace California common law negligence suit for late check return, but denying liability in this case); Hecker, 468 N.W.2d at 95 (conversion action not displaced); Great Am. Ins. Co., 385 N.W.2d at 462-64 (common law conversion principles supplement UCC provision).

137. *See, e.g.*, New Jersey Bank, N.A. v. Bradford Sec. Operations, Inc., 690 F.2d 339, 345-46 (3d Cir. 1982); G & R Corp. v. American Sec. & Trust Co., 523 F.2d 1164, 1171 (D.C. Cir. 1975) (where UCC does not govern precise situation, common law contract principles remain); Fireman's Fund Ins. Co. v. Security Pac. Natl. Bank, 149 Cal. Rptr. 883, 902-03 (Ct. App. 1978)

should not thwart the policies of the UCC, read generally and in the particular provisions at issue.¹³⁸ Thus, courts have examined six elements: (1) direct conflict with UCC language;¹³⁹ (2) concord with other UCC provisions;¹⁴⁰ (3) the Code's specificity and adequacy to solve the problem;¹⁴¹ (4) the similarity of the Code to the common law cause of action;¹⁴² (5) the certainty of the Code's remedy;¹⁴³ and (6) conflict with UCC policies.¹⁴⁴

Under these judicial guidelines, article 4A would likely allow a negligence action against a beneficiary's bank. In the case where neither the originator nor its bank are at fault but the beneficiary's bank should reasonably have suspected the fraud, a suit would meet the courts' requirements. Examining the Code's language first, four elements support using negligence. First, no direct conflict arises between a negligence action and 4A — such a suit only contravenes UCC silence. Second, negligence principles are common in Code provisions governing analogous situations, such as forged indorsements and embezzlement by check.¹⁴⁵ Third, article 4A itself employs negligence or quasi-negligence tort principles to determine the liabilities of parties other than the beneficiary's bank.¹⁴⁶ Fourth, the language of 4A itself inadequately governs the case of an innocent sender and a negligent beneficiary's bank, either conflicting with other UCC provisions or resting liability on a prohibitive burden of proof and exonerat-

("Under § 3-418, common-law liability is excluded and the controlling question is whether payment of the check [by the drawee] was 'final.'") (citation omitted); *Eldon's Super Fresh Stores v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 207 N.W.2d 282, 289 (Minn. 1973) (holder-in-due-course protection cuts off negligence action against taker of instrument); *Consolidated Water Supply Dist. No. C-1 v. Farmer's Bank*, 686 S.W.2d 844, 853 (Mo. Ct. App. 1985) ("padded payroll" case governed entirely by § 3-405); *Brummund v. First Natl. Bank*, 656 P.2d 884, 888 (N.M. 1983) (§ 9-311's allowance for a debtor's disposition of collateral supplies the "entirety" of the law governing transferability of secured collateral); *Prudential-Bache Sec., Inc. v. Citibank, N.A.*, 536 N.E.2d 1118, 1121 (N.Y. 1989) (in absence of bad faith, negligence of depository bank irrelevant where § 3-405 implicated in "fictitious payee" case; Code section evinces specific choice to allocate loss to employer in this particular scenario and allowing common law action would "nullify" § 3-405); *accord Hinkle v. Cornwell Quality Tool Co.*, 532 N.E.2d 772, 782 (Ohio Ct. App. 1987).

138. See *New Jersey Bank*, 690 F.2d at 345-46. But the many different and at times conflicting policies in the UCC may make them judicially manipulable, allowing easier justification for resort to outside law. David Frisch, *Buyer's Remedies and Warranty Disclaimers: The Case for Mistake and the Indeterminacy of U.C.C. Section 1-103*, 43 ARK. L. REV. 291, 337 (1990). For a discussion of the result of this confusion, see *infra* section III.A.2.

139. See *supra* note 133 and accompanying text.

140. See *supra* note 134 and accompanying text.

141. See *supra* note 135 and accompanying text.

142. See *supra* note 136 and accompanying text.

143. See *supra* note 137 and accompanying text.

144. See *supra* note 138 and accompanying text.

145. See *AmSouth Bank, N.A. v. Spigener*, 505 So. 2d 1030, 1036 (Ala. 1986); *supra* notes 24-25, 91, 94 and accompanying text.

146. See *supra* notes 65-68.

ing the most culpable party.¹⁴⁷

The other judicial factors support common law incorporation as well. Negligence would expand the parameters of the Code to provide a remedy supported by other sections' principles, and redress an obvious wrong. A negligence theory comprises different elements than the theory of strict liability in article 4A, and 4A's liabilities are essentially contractual,¹⁴⁸ not grounded in tort. Article 4A does not completely overlap the elements of the common law standard; moreover, its reasonableness threads and regulatory due care reveal at least partial acceptance of negligence liability.

The first five judicial elements suggest an intermediate or probationary acceptance of a negligence action even under 4A. Part III of this Note addresses any conflict between a negligence action and UCC policies, the final factor courts have examined. If this last element is satisfied, the judicial framework would support a common law negligence action against a beneficiary's bank.

An examination of several cases decided under articles 3 and 4 and involving negotiable instruments illustrates the judicial framework's treatment of negligence principles. Where a bank's behavior did not meet the particular provisions of articles 3 and 4 and the plaintiff sued under a theory outside the UCC — like a plaintiff's suing a beneficiary's bank for negligence after the adoption of 4A — courts have allowed the action. In a suit against a depository bank which paid with notice of the invalidity of the negotiable instrument presented by the payee, a common law action survived because a bank's knowledge prevents holder-in-due-course status and no other theory would allow a direct suit by the drawer.¹⁴⁹ Likewise, the Code's "rationales [were] inapplicable" and a payor bank recovered through the equitable principle of restitution, despite the absence of a precise UCC remedy, where its payee had reason to know of the drawer's insolvency.¹⁵⁰ In a conversion suit where the failure to exercise due care when paying on an indorsement was an element of the UCC cause of action, section 3-419 displaced common law negligence,¹⁵¹ a result consistent with the

147. See *supra* section I.A.

148. See Felsenfeld, *supra* note 76, at 238-39; Wulff, *supra* note 3, at 108; cf. *In re Spears Carpet Mills, Inc.*, 86 B.R. 985 (Bankr. W.D. Ark. 1987), *aff'd.*, 85 B.R. 86 (W.D. Ark. 1988) (finding pre-4A wire transfer liability to be contractual, based on customer's dealings with bank).

149. *Wymore State Bank v. Johnson Intl. Co.*, 873 F.2d 1082, 1087 (8th Cir. 1989) (employer may sue depository bank for its negligence for allowing payment on indorsements forged by employee).

150. *Morgan Guar. Trust Co. v. American Sav. & Loan Assn.*, 804 F.2d 1487, 1496 (9th Cir. 1986), *cert. denied*, 482 U.S. 929 (1987).

151. *Equitable Life Assurance Socy. v. Okey*, 812 F.2d 906, 908-09 (4th Cir. 1987) (overlapping nature of two causes of action allows § 3-419, implicating due care concepts, to displace negligence); cf. *Penalosa Coop. Exch. v. A.S. Polonyi Co.*, 745 F. Supp. 580, 584 (W.D. Mo. 1991) (common law negligence action not displaced by UCC conversion where state law requires refusal of depositor-payor to return instrument, not just acceptance and presentment of instrument).

denial of causes of action overlapping the elements of Code liability. Where a drawer's suit against a depositary bank collided with final payment immunity, the Code displaced the common law because the language of the UCC flatly cuts off *any* cause of action,¹⁵² whether within or without the Code. Courts have resorted to outside law, despite its tendency to frustrate the Code's system,¹⁵³ where causes of action distinct from UCC theories are asserted and other provisions and principles in the Code support the claim.

These interpretations of articles 3 and 4's incorporation of the common law imply that a negligence action survives in the wire transfer cases presented by this Note. Like a depositary bank that pays over an obvious forgery, a beneficiary's bank that doubts the beneficiary's authority¹⁵⁴ should have notice from the circumstances. Due-care principles would not replicate the beneficiary's bank's current 4A liability and therefore should remain, for unlike 3-419's usurpation of common law negotiable instrument conversion, no UCC provision applicable to the beneficiary's bank includes due care elements. And in contrast to the negotiable instrument situation noted above, where the UCC flatly dismissed a cause of action, a beneficiary's bank may bear liability to at least the beneficiary if it fails to execute a payment order properly¹⁵⁵ and probably to another party if it fails to act in good faith.¹⁵⁶ A negligence suit against a beneficiary's bank, as in these analogous negotiable instrument cases, arises outside the UCC but is supported from within by other Code provisions.

2. Scholarly Commentary

Scholarly criticism of section 1-103 and its judicial interpretations also suggests a framework for incorporation analysis. Commentators recognize that situations exist where courts should be able to supplement the Code with outside principles. The argument for supplementation with common law principles is strongest where the policy of the

152. *Perini Corp. v. First Natl. Bank*, 553 F.2d 398, 416 (5th Cir. 1977) (en banc).

153. Not all commentators approve, however. See WHITE & SUMMERS, *supra* note 51, § 16-1, at 690 ("To grant . . . affirmative claims based on negligence willy-nilly is to throw sand in the gears of a carefully designed machine. The nonnegligence theories of liability [in articles 3, 4, and 5] . . . have been carefully worked out by the drafters and for the most part constitute an entirely sensible allocation of the risks of fraud loss.").

Yet when the *not-for-the-most-part* case occurs, the language will not be clear or the UCC will fail; in those cases courts have looked to outside law, as this Note argues they may need to do in cases nominally under article 4A. Furthermore, the risk of upsetting the delicate balance of articles 3 and 4 is less significant since the adoption of comparative negligence principles in the amendments to those articles. This recent infusion of flexible standards indicates that more balancing is appropriate.

154. Article 4A recognizes that the beneficiary's bank may withhold payment from the beneficiary based on a reasonable doubt about the beneficiary's authorization. See U.C.C. § 4A-404(a).

155. See U.C.C. § 4A-404(a)-(b) (damages for erroneous transmittal of funds).

156. See *supra* notes 46-52, 55 and accompanying text.

UCC comports with the common law or where the Code's policy is conflicting or vague.¹⁵⁷ Reading the Code's particular provisions in light of section 1-102, courts improperly resort to the common law where the "common law rule conflicts with *clearly defined* Code purposes and policies which apply to the problem."¹⁵⁸ Analogous Code provisions¹⁵⁹ and the Code's language directly bearing on the particular issue reflect UCC policy with which common law theory should not conflict. Finally, a court should "prune back the Code" and disregard its statutory boundaries "where the reason of the limitation does not apply"¹⁶⁰ — where displacement would not serve the Code's purposes. This search for conflict first with particular Code language and then with Code policies allows for either explicit¹⁶¹ or implicit¹⁶² displacement of the common law. The analysis requires an examination of the entirety of the UCC.

Not all commentators fully adhere to this mainstream scholarly analysis. Professor Summers, for example, would allow outside principles of equity to supplement the UCC more frequently. Section 1-103, Summers argues, imposes a *duty* on a judge to look beyond the Code when equitable considerations are necessary to prevent injustice.¹⁶³ The drafters purposely authorized resort to outside law to prevent judges from bending Code provisions or indulging in dishonest reasoning to reach correct results: overt recognition of an outcome's true grounding, whether equity or the Code, is preferable in the long run.¹⁶⁴ Therefore, Summers reasons, section 1-103 must be broadly construed as a recognized judicial tool. Explicit recognition of an equitable principle in other parts of the Code provides additional support for incorporation of an equitable theory.¹⁶⁵ Summers concludes that the UCC displaces an equitable principle only when the language, policies and analogous Code provisions all militate against its inclusion.¹⁶⁶ Summers' theory should be applicable to actions at law as

157. See Hillman, *supra* note 130, at 687; Nickles, *Part II, supra* note 131, at 227 ("The principles of law and equity are not displaced by the provisions of the Code and should supplement them in any case where their application more definitely will promote the orderly conduct of commercial affairs [under] the Code.") (footnote omitted).

158. Hillman, *supra* note 130, at 687-88 (emphasis added). The interaction between common law negligence and Code policy is more fully explored in section III.A.2, *infra*.

159. Hillman, *supra* note 130, at 682.

160. HILLMAN ET AL., *supra* note 51, ¶ 1.04[2] (quoting U.C.C. § 1-102 cmt. 1).

161. See Dow & Ellis, *supra* note 129, at 798 (noting that courts have required clear displacement by Code language). Some commentators argue that explicit displacement is not required by § 1-103. See *supra* note 129 and accompanying text.

162. See Dow & Ellis, *supra* note 129, at 799 (displacement through indirect conflict between UCC principles and common law principle); Hillman, *supra* note 130, at 687-88 (same).

163. Summers, *supra* note 110, at 909.

164. *Id.* at 910.

165. *Id.* at 918.

166. *Id.* at 938.

well, with a caveat: because the Code itself supplants prior legal provisions, the survival of common law causes of action appears more suspicious. Equity, after all, is a remedial tool that courts employ after the fact; law, like the Code, is meant to proscribe behavior and influence parties before a dispute arises.¹⁶⁷

This scholarly criticism, both Summers' and the more conservative view, supports the survival of negligence liability for a beneficiary's bank after article 4A. Under their analyses, the Code's provisions do not clearly supplant negligence liability.¹⁶⁸ Consider the case in section I.A.1 where an embezzling officer or known criminal, perhaps an individual with a readily discoverable history of fraud, opens an account with a bank and immediately begins accepting large wire transfers. The commentators' analyses suggest that a beneficiary's bank which allows the transfers should still be subject to a common law negligence claim.

Five factors support the claim that article 4A does not displace a common law negligence action. First, through the security procedure requirements 4A apparently seeks to assign liability based upon blame. Negligence liability for the beneficiary's bank that should suspect the impropriety of the transfers to its customer's account upholds that goal. Second, the policies inherent in articles 3 and 4, which support greater payor liability, contradict 4A's seeming allowance of a beneficiary's bank to ignore evidence of fraud and freely pay a questionable beneficiary. Third, the availability of a negligence claim in this scenario comports with much of the Code¹⁶⁹ and would allow a result consistent with that in the comparable situation involving forged checks cashed in breach of fiduciary duty.¹⁷⁰ Fourth, the "reasons of the limitation" on the beneficiary's bank's liability — speed¹⁷¹ and loss prevention¹⁷² — do not apply in these wire transfer cases. In the case of an innocent originator, the security procedure rules do not prevent loss;¹⁷³ and in the name and number cases, the beneficiary's bank can best discover the fraud and moreover, because of the amounts likely

167. *Id.* at 925, 936-37. But negligence is less susceptible to this criticism, for not only is the concept an equitable as well as legal one, *see supra* text accompanying notes 108-10, the unsatisfactory operation of article 4A in these wire transfer cases, *see supra* section I.A, fails to warn the parties and adequately proscribe their behavior.

168. *See* Hillman, *supra* note 130, at 687-88 (arguing for common law supplementation where Code's policy is too vague to establish); *id.* at 695 ("In some situations . . . through close analysis a court may conclude that both express Code language and Code purposes and policies are hopelessly unclear or contradictory. Where that is so, a resort to the common law is justified.").

169. *See supra* notes 70-75, 89-94 and accompanying text.

170. *See supra* note 24 and accompanying text.

171. U.C.C. art. 4A Prefatory Note; § 4A-207 cmt. 2.

172. *See* U.C.C. § 4A-203 cmt. 3 (security procedure requirement meant to prevent theft).

173. *See* WRIGHT, *supra* note 12, § 1.3 (no system completely secure); *infra* text accompanying note 247.

involved, already must often delay payment to verify the beneficiary's identity.

Summers' theory clearly supports negligence liability, through "conservative" scholarly analysis. The UCC lacks the unified front needed to displace the common law: some of the language of 4A emits due-care principles, as do Code policies¹⁷⁴ and parallel sections in articles 3 and 4. Judicial application of negligence principles would override parts of the UCC but allow the court to do justice without straining for a fictional, Code-based legitimation for the outcome.

Both courts' and scholars' analyses thus suggest that 4A incorporates, rather than displaces, negligence. The courts' and commentators' approaches examined in the context of a negligence action against a beneficiary's bank indicate survival of the common law. The certainty of this proposition, however, depends upon the conflict, if any, between a common law negligence action and Code policies. This implicit displacement of common law negligence by UCC policies,¹⁷⁵ the sixth consideration the cases advance and a major concern of the commentators, is more problematic. Part III addresses this interaction between UCC policy and common law negligence.

III. NEGLIGENCE LIABILITY AND QUESTIONS OF POLICY

Conflict with UCC purposes presents the final challenge to a common law theory. An analysis of whether common law survives compares that law to general Code policies and to those policies derived from both directly relevant and analogous provisions.¹⁷⁶ As Code policy comports with the common law theory¹⁷⁷ and, implicitly, when policies suggesting displacement are weak, the common law more likely survives. Aside from displacement analysis, extra-Code policy considerations also indicate from a societal perspective what party should ideally bear the loss to promote fairness and efficiency, regardless of precise UCC goals.

This Part discusses the policy implications of a negligence action against a beneficiary's bank. Section III.A.1 details both explicit and implicit policies of the UCC as a whole and article 4A in particular. The section then argues that the Code's manifold and sometimes divergent policy scheme both supports and contradicts common law liability. Section III.A.2 examines the actual interaction between UCC policy and negligence principles, the final consideration necessary to allow a common law action. The section maintains that negligence liability does not conflict prohibitively with these policies and in fact

174. See *infra* notes 226-29, 265-67 and accompanying text.

175. See *supra* note 158 and accompanying text.

176. See *supra* note 132 and accompanying text.

177. See *supra* note 157 and accompanying text.

supports many of them, fulfilling the last requirement for common law incorporation. Section III.B argues that overarching policy, derived from both the Code's liability principles and independent societal concerns, supports the survival of common law liability and buttresses the claim that article 4A should not preclude a negligence action against a beneficiary's bank in certain cases. This Part concludes that the lack of clear harm to stated UCC policies, the Code's underlying acceptance of due care principles, and overarching societal interests warrant allowing a claim against the negligent beneficiary's bank.

A. UCC Policies and Negligence Liability

1. The Goals of the Uniform Commercial Code

Like much legislation, the UCC explicitly sets forth its policy goals. The Code "shall be liberally construed and applied to promote [the] underlying purposes and policies" of simplification, clarification and modernization of commercial law, permitting the expansion of commercial practices "through custom, usage and agreement," and uniformity of the law.¹⁷⁸ The drafters wanted parties to know their respective rights and liabilities to foster easy resolution of disputes.¹⁷⁹

As a commercial code, the UCC also advances several implicit purposes. Foremost, UCC rules should promote commerce.¹⁸⁰ Courts, in interpreting the Code, will seek to "serve[] the needs of the particular commercial situation."¹⁸¹ Administrative efficiency, especially the avoidance of excessive litigation, also guides courts in cases under the Code.¹⁸² Section 1-203's duty of good faith dealing,¹⁸³ the prohibition on disclaimers of all duties of due care,¹⁸⁴ emphasizes on

178. U.C.C. § 1-102 (1)-(2).

179. Bryan D. Hull, *Common Law Negligence and Check Fraud Loss Allocation: Has Common Law Supplemented or Supplanted the U.C.C.?*, 51 OHIO ST. L.J. 605, 608 (1990); see also *White v. Hancock Bank*, 477 So. 2d 265, 273 (Miss. 1985) (UCC meant to allow "predictability of consequences of behavior").

180. Cf. Hull, *supra* note 179, at 614 (stating that articles 3 and 4 should be interpreted to promote the use of checks).

181. HILLMAN ET AL., *supra* note 51, ¶ 1.06[2][a] (discussing policy toward extra-Code incorporation).

182. *Id.* ¶ 1.06[2][d][iii] (allowing direct suit against a negligent bank is one manner to prevent waste in these cases). Simplification of the law is furthered, for example, by avoidance of circuitous litigation in check cases where no direct action between a drawer and collecting bank is provided by the UCC. See *Insurance Co. of North America v. Purdue Natl. Bank*, 401 N.E.2d 708, 714 (Ind. Ct. App. 1980) (UCC interpreted to avoid "cumbersome and uneconomical circuitry of actions"); see also *Bradford Trust Co. v. Texas Am. Bank — Houston*, 790 F.2d 407, 409 (5th Cir. 1986) (UCC encourages finality in transactions to prevent repeated suits).

183. U.C.C. § 1-203. The requirement of good faith supersedes all others. See *supra* note 55.

184. U.C.C. § 1-102(3) ("[T]he obligations of good faith, diligence, reasonableness and care prescribed by this Act may not be disclaimed by agreement . . .").

reliance and notice to hold a party liable,¹⁸⁵ implied warranties,¹⁸⁶ rescission for unconscionability,¹⁸⁷ and the provision for full compensation of injured parties¹⁸⁸ all reflect a third implicit policy, ensuring fairness in commercial transactions. Finally, the "rule of reasonableness" guides any construction of the UCC and its provisions.¹⁸⁹ Thus, the Code's policies should not direct absurd results.

Beyond abstract notions of fairness, the Code evidences a system for the imposition of liability based on the level of an actor's awareness — from intentional acts to those done in complete ignorance.¹⁹⁰ This scheme operates alongside the explicit duty of reasonableness.¹⁹¹ As in tort law, these standards support the UCC's deterrence policies.¹⁹² If the thief escapes a victim's suit, the party that dealt with the thief will bear liability, based on the assumption that the party best able to detect the fraud is the most culpable of those remaining.¹⁹³

185. The UCC will in many instances exonerate a party that did not have notice of a claim to goods. *See, e.g.*, U.C.C. §§ 2-312(1)(b) (buyer without knowledge has warranty of good title), 2-403, 1-201(9) (rights of a buyer in the ordinary course of business), 3-302 (holder in due course of negotiable instrument), 9-301, 9-307 (superiority of buyer without notice over holder of security interest in goods), 9-401 (party with knowledge may not assert erroneous filing of financing statement and take free of security interest in goods); *see also* *Schroeder v. Fageol Motors*, 544 P.2d 20, 22 (Wash. 1975). And where a party changes position in reliance on another, mistaken payments may not be recovered from a transferor of a negotiable instrument. U.C.C. § 3-418(c).

186. U.C.C. §§ 2-314, 2-315.

187. U.C.C. § 2-302.

188. *See* U.C.C. § 1-106(1) ("The remedies provided by this Act shall be liberally administered to the end that the aggrieved party may be put in as good a position as if the other party had fully performed . . ."); *Sellers v. Frank Griffin AMC Jeep, Inc.*, 526 So. 2d 147, 150 (Fla. Dist. Ct. App. 1988) (interpreting UCC to provide "meaningful remedies" for car purchaser). Remedy provisions should be interpreted to prevent harsh results. *See Chrysler Credit Corp. v. Sharp*, 288 N.Y.S.2d 525, 529 (Sup. Ct. 1968) ("[Section 1-106's principles are] intended to negate unduly narrow or technical interpretations."). Imposing liability on an innocent account holder or bank for a loss proximately caused by the beneficiary's bank conflicts with this basic tenet. The principle of loss-spreading also supports the policy of full compensation under the Code. *See* Hull, *supra* note 179, at 614 (check fraud loss-allocation scheme policy seeks "best risk-bearer," normally a large bank instead of a small customer).

189. *See* *Minsel v. El Rancho Mobile Home Ctr., Inc.*, 188 N.W.2d 9, 11 (Mich. Ct. App. 1971) (rescission of sales contract); *Pavesi v. Ford Motor Co.*, 382 A.2d 954, 956 (N.J. Super. Ct. Ch. Div. 1978) (same).

190. *See* David M. Phillips, *The Commercial Culpability Scale*, 92 YALE L.J. 228 (1982); *see also* Hull, *supra* note 179, at 635 (check-loss allocation under the Code based on negligence standards). For a detailed explanation of Phillips' "culpability scale" and its application to funds transfer liability, *see infra* text accompanying notes 226-31, 234, 237-42.

191. *See, e.g.*, *Arrow Indus. v. Zions First Natl. Bank*, 767 P.2d 935, 938 (Utah 1988) (duty of all banks to exercise ordinary care); *cf.* *T.W. Oil, Inc. v. Consolidated Edison Co.*, 443 N.E.2d 932, 939 (N.Y. 1982) (good faith and reasonable commercial standards of fair dealing support reasonableness duty in article 2).

192. *See* *Girard Bank v. Mount Holly State Bank*, 474 F. Supp. 1225, 1235 (D.N.J. 1979) (policy of deterring negligent drawers behind articles 3 and 4); *cf.* *Summers, supra* note 110, at 925 (Code meant to prescribe conduct).

193. *See* *Bradford Trust Co. v. Texas Am. Bank — Houston*, 790 F.2d 407, 410 (5th Cir. 1986) (wire transfer; party with personal contact with fraudulent beneficiary held liable); *see also* *Girard*, 474 F. Supp. at 1242 (court should impose liability on party that took from forger); *White v. Hancock Bank*, 477 So. 2d 265, 272 (Miss. 1985) (same); *cf.* *Morgan Guar. Trust Co. v.*

Article 4A itself reflects distinct policy aims for the EFT system. A primary purpose of the new article is to make the law of EFTs uniform and consistent.¹⁹⁴ Because a wire transfer is a unique form of payment, 4A's particular allocation rules are needed to create a distinct and certain liability framework.¹⁹⁵ 4A should promote the processing of funds transfers at a low cost and high speed,¹⁹⁶ for the desire for economy presumably led to the creation of wire transfers. Implicitly, 4A also should encourage the advancement of wire transfer technology.

But the multiplicity of policies indicates that no single UCC policy controls. As the Code furthers potentially divergent purposes — such as fairness and liability based on fault on the one hand and certainty, speed, and uniformity on the other — conflicting principles will pose problems for a court. Courts must strike a balance, perhaps sacrificing certainty of the rules in favor of fault allocation.¹⁹⁷ Even the Code recognizes that, in some cases, certainty should succumb to fairness.¹⁹⁸ Were negligence liability clearly contrary to UCC policy, imposing it would probably be improper.¹⁹⁹ But the Code — even in 4A — both employs and rejects negligence principles; in such a case, an individual UCC policy alone should not be dispositive, though it may inform the analysis.

Article 4A's particular policy goals similarly rest on an uncertain foundation. The new article resulted from compromise,²⁰⁰ and as a result the force behind any one policy is doubtful. As a product of the groups most interested in the process,²⁰¹ the UCC in its primary form and as enacted by the states might be suspect as special interest legislation.²⁰² A more basic objection to the certainty of 4A's policies is that

American Sav. & Loan Assn., 804 F.2d 1487, 1498 (9th Cir. 1986) (transferee from drawer in better position to know of drawer's insolvency and will bear liability under warranty theory).

194. A.L.I. PROCEEDINGS, *supra* note 4, at 400.

195. Ballen & Diana, *supra* note 83, at 1399; Koh, *supra* note 55, at 109. *But see supra* section I.B (arguing that the differences between wire transfers and other payment mechanisms do not justify disparate treatment and that negligence liability should apply to both in some cases).

196. A.L.I. PROCEEDINGS, *supra* note 4, at 400; *see* French, *supra* note 15, at 1426 ("A central problem confronting the drafters of Article 4A was how . . . not [to] unduly disrupt the quick, efficient handling of funds transfers.").

197. *See* HILLMAN ET AL., *supra* note 51, § 1.06[2][a] (suggesting that, in bank payment cases, tort principles are more applicable and may overcome policies of certainty and predictability); Hull, *supra* note 179, at 635.

198. *See, e.g.,* U.C.C. § 4-402 cmt. 2 (beneficiary's bank's liability for wrongful failure to pay beneficiary).

199. *See* Hillman, *supra* note 130, at 683; *see supra* section II.B (relevant for displacement inquiry); *cf.* Hull, *supra* note 179, at 616 (negligence liability in check fraud cases).

200. A.L.I. PROCEEDINGS, *supra* note 4, at 401.

201. *See id.* at 400-01 ("constituent groups" included banks, the Federal Reserve System, and corporations).

202. *Cf.* Hull, *supra* note 179, at 611 (stating that article 4's favorable treatment of banks raises suspicion).

the article only allocates loss explicitly where fault exists on the sending end of the transfer²⁰³ and may not apply where only the beneficiary's bank is at fault. Demands for speed and certainty less strongly contradict the argument for liability based on relative fault where these Code policies have little relevance. Liability for a negligent beneficiary's bank therefore may survive objections based upon 4A's purposes.

Furthermore, the desired low-cost wire transfer might be unrealistic; when compared with other payment systems, wire transfers are fairly expensive.²⁰⁴ The prospect of loss alone makes the funds transfer process inherently costly, and as the risk grows with the volume of wire transfers,²⁰⁵ so will the real cost. Considering the enormous amounts typically transferred,²⁰⁶ a slightly higher price for an increased duty of care seems insubstantial. The value of a higher cost — reduced losses — undercuts the policy favoring inexpensiveness of the wire transfer per se.

The goal of liability certainty most forcefully rebuts the claim for common law negligence liability. Article 4A's current system softens this objection to a limited extent. The incorporation of liability rules from other systems²⁰⁷ might place liability on a party different from that under 4A.²⁰⁸ Uncertainty is thus inherent in 4A itself, contrary to the article's supposed bright-line rules.

2. *The Interaction Between Negligence and UCC Policies*

Against this uncertain, multifaceted policy framework common law negligence must survive displacement. Any common law theory incorporated into the UCC should comport with Code policies or at least minimize harm to them. If so, the extra-Code cause of action likely remains. This section therefore examines common law negligence in light of the UCC's many divergent purposes and concludes that negligence should remain a cause of action.

Negligence principles do not conflict prohibitively with either general UCC or special article 4A policies. The certainty and uniformity

203. See *supra* notes 16-18 and accompanying text.

204. See Geva, *supra* note 78, at 188 n.9 (arguing that absolutely, wire transfers are costlier: "The alleged 'low cost' feature of the wire payment . . . is in relation to the amount of the average wire payment and not as compared to other payment systems."). But see J. Kevin French, *Article 4A's Treatment of Fraudulent Payment Orders — The Customer's Perspective*, 42 ALA. L. REV. 773, 781 (1991) (arguing that absolute prices rise little as the transfer's amount does, but not directly addressing absolute price concerns).

205. French, *supra* note 204, at 775.

206. See *supra* note 82 and accompanying text.

207. Section 4A-501 incorporates rules outside 4A, despite any inconsistency. U.C.C. § 4A-501; see *supra* notes 103-04 and accompanying text.

208. Each automated clearinghouse observes its own rules system. See BAKER & BRANDEL, *supra* note 103, ¶ 19.02.

that both section 1-102 and article 4A itself seek suffer from a duty such as reasonableness,²⁰⁹ but the magnitude of the resultant uncertainty and its harm can be mitigated.²¹⁰ General common law principles of reasonable care, article 3 and 4 reasonableness standards, and guidelines already extractable from previous cases should provide standards of conduct. The banking industry's behavior toward suspicious transfers may provide a valuable and feasible guide.²¹¹ A common argument for certainty looks to the ease with which the parties will be able to price their transaction.²¹² If the parties know definitely that one of them will bear the loss, they can determine their potential costs and how much to charge as a bank or pay as a customer. But even if certainty does simplify pricing, the price may not efficiently allocate loss.²¹³

Further, any expectation of uniformity under 4A is unrealistic. Judges seeking to avoid placing the loss on an innocent party may do more covert violence to predictability and uniformity²¹⁴ than would the familiar law of negligence. Even in cases under the UCC, circuits and states disagree as to its meaning and application.²¹⁵ States often incorporate variations into the UCC when enacting it,²¹⁶ and so article 4A ultimately may not represent uniform law. Because lawyers already examine the Code and case law of any jurisdiction involved in a transaction, the threat of unfair surprise is mitigated.

Facilitation of speedy transactions, one of 4A's primary concerns, would suffer if courts imposed negligence liability. With a limited burden on the beneficiary's bank,²¹⁷ however, the only impediments to result will be the cost-effective ones. A bank need inquire only when

209. See *Bradford Trust Co. v. Texas Am. Bank* — Houston, 790 F.2d 407, 409 (5th Cir. 1986) (court, prior to 4A, held that commercial situations require more certainty than in traditional tort cases); cf. Hull, *supra* note 179, at 613 (common law check fraud liability "undercut[s]" certainty policy).

210. Cf. Hull, *supra* note 179, at 614 (certainty in checking rules not unduly harmed).

211. See Phillips, *supra* note 190, at 276 ("[I]mprecision is tolerable considering the number of similarly situated commercial actors whose existence and conduct provide good evidence to establish the standard of conduct that would satisfy the negligence principle."); cf. *Kugler v. Romain*, 279 A.2d 640, 651-52 (N.J. 1971) (overruling objections to vagueness of UCC unconscionability principles); Hull, *supra* note 179, at 617 (certainty in checking cases derived from courts' application of common law negligence).

212. See, e.g., *Bradford Trust*, 790 F.2d at 409.

213. Efficiency requires the party that can most easily prevent the loss to bear it, resulting in the least cost to society. See Thévenoz, *supra* note 17, at 901; White, *supra* note 66, at 616; see also *infra* section III.B.

214. See Summers, *supra* note 110, at 943.

215. Compare, e.g., *Evra Corp. v. Swiss Bank Corp.*, 673 F.2d 951, 955 (7th Cir.), cert. denied, 459 U.S. 1017 (1982) (rejecting the applicability of article 4 to wire transfers) with *Bradford Trust*, 790 F.2d at 409 (accepting applicability).

216. For examples of the many variations that may arise, see generally [State UCC Variations] U.C.C. Rep. Serv. (Callaghan 1991); 1-3A UNIFORM COMMERCIAL CODE (U.L.A.) (West 1989 & Supp. 1991).

217. See *supra* text accompanying notes 37, 97-98; cf. Hull, *supra* note 179, at 621 (arguing

the circumstances of the transfer, the beneficiary's behavior, or the character of the transfer suggests to a reasonable person that a theft is underway. The assertion that any requirement for the beneficiary's bank "would bring the wheels of commerce to a halt"²¹⁸ ignores the history of wire transfers. Even under a regime of common law liability, including the possibility of a negligence claim, wire transfers proliferated in the 1970s and 1980s.²¹⁹

Ironically, a negligence liability scheme furthers the modernization of wire transfer systems and governing law. The Code's construction favoring reasonableness should complement the realities of commerce,²²⁰ and negligence, in contrast to a rigid code, allows courts flexibility to meet new situations.²²¹ The common law can better respond to unforeseen problems, especially new forms of fraud.²²² Negligence liability and its ensuing allocation based on unreasonableness provides incentive necessary to improve procedures and technologies,²²³ thereby advancing the EFT system indirectly. Also, a direct negligence suit between the tortfeasor and the victim of its conduct simplifies a given case by restricting the scope of litigation following a fraud; a chain of multiple suits seeking the guilty party is avoided,²²⁴ as is haggling between parties not directly responsible for the loss. Thus the gain to the system at least partially offsets any increased cost as a result of negligence liability. Further, nonquantifiable benefits of negligence liability such as fairness²²⁵ might even exceed any rise in the overall cost of wire transfers, especially for the unwitting victims of the fraud.

Indeed, in many ways Code policy already embraces negligence principles by allocating loss based on fault. Professor Phillips has demonstrated this recurring pattern of liability, including negligence liability, in the UCC.²²⁶ Under Phillips' "culpability scale," intentional harms or those committed knowingly in a given transaction will

that a requirement that a depository bank in fraud cases authenticate the depositor is not substantial enough to justify refusal of liability).

218. *Richards v. Platte Valley Bank*, 866 F.2d 1576, 1583 (10th Cir. 1989) (bank need not inquire into possible embezzlement by wire transfer without actual knowledge of the fraud).

219. See Wulff, *supra* note 3.

220. See, e.g., *T.W. Oil, Inc. v. Consolidated Edison Co.*, 443 N.E.2d 932, 937 (N.Y. 1982).

221. Phillips, *supra* note 190, at 277-78 ("In the absence of *constant* statutory revision . . . [a] negligence standard allows a change of legal requirements as the underlying practices in an industry change." (emphasis added)); cf. U.C.C. § 4-103 cmt. 1 ("[I]t would be unwise to freeze present methods of [check collection] by mandatory statutory rules.").

222. See Tallackson & Vallejo, *supra* note 83, at 665. Variation in some cases is desirable. Cf. Hull, *supra* note 179, at 635, 642 (check-fraud liability).

223. Rainer Stockmann, *Liability of Intermediary and Beneficiary Banks in Funds Transfer: A Comparative Study of American and German Law*, 8 INTL. TAX & BUS. LAW. 215, 257 (1990).

224. Cf. *supra* note 182.

225. See *infra* notes 265-67 and accompanying text.

226. Phillips, *supra* note 190.

incur liability.²²⁷ If no intentional harm is involved, then one who acts with knowledge of the circumstances that should indicate a danger of loss or "otherwise fail[s] to exercise due care" will be liable for his negligent breach.²²⁸ Last on the culpability scale, if no intentionally or negligently acting parties are implicated, is the least-cost risk-avoider²²⁹ (LCA) who represents the least culpable actor subject to liability.

Consistent with notions of fault and responsibility, the parties on the scale who act with a lower level of intent can shift liability upwards if they prove another to have had a higher degree of awareness: from the LCA to the negligent actor, from the negligent actor to the knowing actor, and on to the intentional actor.²³⁰ Any higher party will be liable to any lower party, if that lower party must pay the victim. Examples of Phillips' culpability scale in the Code include article 2's title and warranty provisions, the forgery loss allocation of articles 3 and 4, and holder-in-due course status.²³¹ An employee's forgery illustrates the liability hierarchy. The forging employee (the intentional harmer) will always bear liability under section 3-416's transfer warranty; next, if the bank that pays the forger fails to exercise ordinary care and contributes to the loss, the bank must pay "to the extent the failure" led to the loss.²³² If the bank acts with due care, then the employer will incur liability under section 3-405, on the assumption that "the employer is in a far better position to avoid the loss."²³³ The employer is the least-cost risk-avoider and will suffer if no other available party is more accountable. In the UCC, the intentionality of a party's behavior often determines liability.²³⁴ A common law negligence action would thus comport with the underlying Code liability structure.

The rule of reasonableness suggests that the party most responsible or at least the one able to avoid the loss at least expense should bear it, and in several places the UCC adopts this sensible position. Though some Code policies would suffer from a flexible allocation based on fault, others would benefit from negligence liability; furthermore, the

227. *Id.* at 228.

228. *Id.*

229. *See id.* at 229.

230. *Id.* Yet 4A's provisions would deviate from this scheme by releasing the beneficiary's bank, unless it is neither the LCA nor the negligent party. As section III.B argues, *infra*, even if the negligent bank is not the LCA, it should still be liable under the scale; if it is the LCA, then it should only shift the loss if another party is more negligent.

231. Phillips, *supra* note 190, at 232-48.

232. U.C.C. § 3-405(b).

233. U.C.C. § 3-405 cmt. 1.

234. Phillips, *supra* note 190, at 228-29, 234, 289 (describing culpability scale); *see* Hull, *supra* note 179, at 607 (in check liability cases, an initial allocation is tempered by fault-based liability); *id.* at 621, 628 (Code's purpose of avoiding loss served by culpability allocation).

UCC already embraces negligence principles. This adhesion to loss-allocation based on culpability, and a lack of cohesiveness in UCC policy needed for displacement, supports negligence incorporation.

B. *The Totality of Policy: Who Should Bear the Loss?*

Overarching loss-bearing policy — the determination of who should bear the loss in a given case — derives from both the UCC and considerations outside the Code. Code guidance and non-Code social considerations, such as loss-avoidance efficiency and fairness, exist simultaneously. The two generally coincide,²³⁵ but any inconsistency requires a choice between upholding only the apposite Code principles or satisfying societal expectations. In the case of a negligent beneficiary's bank in a wire transfer, both the UCC's culpability policy and overall social concerns support liability.

The Uniform Commercial Code often places a loss on the LCA, the party "who, by hypothesis, could most cheaply have avoided" the result.²³⁶ Following Phillips' culpability scheme, the LCA is strictly liable for loss²³⁷ as the party that occupies the liability default position. If the LCA is not the negligent party, it can shift the loss to a negligent actor.²³⁸ Article 4A, however, fails to uphold the UCC's culpability scale completely. Negligence tempers strict liability in several places in article 4A; the customer's ability to attach liability for the failure to implement a reasonable security procedure and the failure to reasonably examine bank reports that absolve a bank from strict liability on an erroneous payment order provide examples.²³⁹ But article 4A, by releasing the negligent beneficiary's bank, departs from the pattern otherwise upheld throughout the Code. To impose liability consistent with the Code's overall principles, a court should determine liability

235. See Phillips, *supra* note 190, at 252-53 ("[M]ost people would agree that the culpability scale reflects their own assessment of the relative . . . blameworthiness . . . and further, would place responsibility for loss on the party with greater culpability.").

236. *Id.* at 229; the definition of LCA is from White, *supra* note 66, at 623.

237. See *Bradford Trust Co. v. Texas Am. Bank — Houston*, 790 F.2d 407, 410 (5th Cir. 1986) (bank that dealt with thief and honored facially flawed payment order was "in the best position to avoid the loss" and is held liable); *New Jersey Bank, N.A. v. Bradford Sec. Operations*, 690 F.2d 339, 347 (3d Cir. 1982) ("Recognizing a remedy in tort furthers [the UCC policy of] . . . placing the risk of loss on the party most able to minimize that risk.").

238. Phillips, *supra* note 190, at 229. Some commentators have suggested an allocation based on the ability to spread the loss from wire transfer error. *E.g.*, Herbert F. Lingl, Comment, *Risk Allocation in International Interbank Electronic Fund Transfers: CHIPS & SWIFT*, 22 HARV. INTL. L.J. 621, 632 (1981); cf. Stockmann, *supra* note 223, at 260-61 (discussing German law, which apportions loss to limit the harshness of liability). But strict liability, without regard for loss-avoidance or negligence, is problematic. Seeking the "deep pocket," an artificial imposition of fault, violates notions of fairness, see WHITE & SUMMERS, *supra* note 51, at 692 (a bank should bear the loss because of its ability to prevent it, not because of its wealth), and also may result in an inefficient allocation of loss, see *infra* text accompanying notes 252-58.

239. See *supra* notes 70-71 and accompanying text.

based on culpability and LCA status.²⁴⁰ This inquiry resembles the Hand formula,²⁴¹ but under the culpability scale Phillips describes, the LCA need make a lesser inquiry and would only incur liability based on facts it could reasonably know.²⁴² Under these standards, the beneficiary's bank should suffer liability if it could have most easily avoided the loss or through its negligence allowed the fraud,²⁴³ and no other accessible party is more culpable.²⁴⁴

In the hypothetical cases presented in this Note, the beneficiary's bank should bear the loss as both the LCA and the negligent party. It could most cheaply avoid the harm²⁴⁵ with an inexpensive duty to confirm the accuracy of the order.²⁴⁶ Where the originator and originator's bank are both innocent, for example, no amount of prevention could have impeded the loss;²⁴⁷ the beneficiary's bank, on the other hand, might reasonably have stopped the theft with a quick call-back, compliance with federal rules, or an inquiry into the beneficiary's identity. Computer programs or occasional audits by the beneficiary's bank would also minimize name-number fraud at a much lower cost when compared with the security needed on the sending end of the transaction.

No Code section, however, explicitly allocates liability to the LCA,²⁴⁸ and thus common law negligence provides the only method for recovery in agreement with Code principles. For under this scheme, even if the purported sender-account holder or the originator's bank could have avoided the loss at much greater cost,²⁴⁹ either

240. See White, *supra* note 66, at 623 (LCA's liability would reduce losses and promote uniformity). Ability to avoid the loss has supported a beneficiary's bank's liability. See, e.g., *Evra Corp. v. Swiss Bank Corp.*, 673 F.2d 951, 957 (7th Cir.), *cert. denied*, 459 U.S. 1017 (1982).

241. White, *supra* note 61, at 616. The Hand formula, from *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947), requires that the cost of prevention outweigh the potential loss reduced by its probability of occurrence for a party to avoid negligence liability.

242. Phillips, *supra* note 190, at 229; see also *id.*, at 254 (disregard of "considerations that others acting reasonably would have entertained").

243. See, e.g., *Shawmut Worcester County Bank v. First Am. Bank & Trust*, 731 F. Supp. 57, 64 (D. Mass. 1990) (bank could have prevented wire transfer loss through the exercise of reasonable care); *Central Coordinates, Inc. v. Morgan Guar. Trust Co.*, 494 N.Y.S.2d 602, 605 (Sup. Ct. 1985); cf. *New Jersey Bank, N.A. v. Bradford Sec. Operations*, 690 F.2d 339, 347 (3d Cir. 1982) (loss from forged check placed on LCA, the negligent depository bank); *HILLMAN ET AL.*, *supra* note 51, ¶ 14.07[1][b] (citing check cases holding negligent LCA liable).

244. See *supra* note 230 and accompanying text.

245. See Lingl, *supra* note 238, at 658 (The party "'in possession' of the message . . . is usually the . . . best cost-avoider."). Requiring the originator or its bank to erect a foolproof system would impose considerable expense, see WRIGHT, *supra* note 12, § 5.3 (effective security technology is costly), and a beneficiary's bank's responsibility for its own reasonable observations would mitigate the need for state-of-the-art protection by the originator.

246. See *supra* text accompanying notes 31, 35-37, 97-98.

247. See WRIGHT, *supra* note 12, § 1.3 (computer system vulnerability).

248. See White, *supra* note 66, at 623.

249. For higher-cost risk-avoiders, the security needed to prevent loss may prohibit them from even considering wire transfers. Benner, *supra* note 5, at 248.

party should still be allowed to shift the loss to the more culpable, negligent beneficiary's bank.²⁵⁰ Because the reasonable observer would likely conclude that the bank acted unreasonably in not making even a *minimal* inquiry, especially considering the potential loss, liability should attach.²⁵¹

Separate societal concerns also support a negligence action against a beneficiary's bank in these cases, regardless of UCC considerations. A fair allocation should result and loss-avoidance cost will settle at the lowest level so that only efficient losses will result. First, because the risk of loss increases with the level of an actor's unreasonableness, failure to hold a negligent actor liable increases the cost of loss prevention.²⁵² A negligent party can prevent the loss more easily because its information costs are lower²⁵³ — having the ability to escape liability, it must only reasonably observe the circumstances and need not gather all information necessary to avoid loss absolutely. An account holder-originator, by contrast, would bear much higher information costs in monitoring both ends of the transaction.²⁵⁴ Second, a party shielded by reasonable care status will take preventive steps only when less expensive than compensation.²⁵⁵ Third, the standard discourages losses themselves, because a negligent beneficiary's bank shielded from liability by the reasonableness of its behavior is more likely to act to prevent loss than is a strictly liable originator or originator's bank with no possibility of escape.²⁵⁶ Consequently, lower total loss results from a due care standard, with fewer losses occurring and less cost to prevent them. LCA liability achieves the most efficient result,²⁵⁷ and because the LCA here is also the negligent party, negligence liability lowers the overall cost to society.²⁵⁸

250. See Phillips, *supra* note 190, at 289 ("[The] Code's general pattern of loss-allocation reflects . . . [an] instrumental approach . . . [that seeks] risk reduction . . . [based on] culpability."); Koh, *supra* note 55, at 110 n.145 ("Guided by ordinary negligence principles, the sending bank should invoke last clear chance to shift its loss.").

251. This Note assumes that negligence has arguably occurred. The issue is whether it may be claimed at all. If not proved, however, the only basis for a beneficiary's bank's liability would be as least-cost avoider — a basis absent from article 4A. See *supra* note 248 and accompanying text.

252. See Phillips, *supra* note 190, at 260.

253. *Id.* at 259.

254. See Stockmann, *supra* note 223, at 264; cf. *Evra Corp. v. Swiss Bank Corp.*, 673 F.2d 951, 958 (7th Cir.), *cert. denied*, 459 U.S. 1017 (1982) (placing the burden of collecting information on sending bank is inefficient).

255. RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 92 (1972) (under a negligence standard, a party will adopt precautions that cost less than its potential losses).

256. Phillips, *supra* note 190, at 259. If one party will almost certainly lose, it will have no incentive to fight despite its innocence. See *Bradford Trust Co. v. Texas Am. Bank — Houston*, 790 F.2d 407, 409 (5th Cir. 1986); Scott, *supra* note 82, at 1712.

257. POSNER, *supra* note 255, at 70; Thévenoz, *supra* note 17, at 901.

258. Cf. POSNER, *supra* note 255, at 93-95 (although strict liability alone might result in efficiency in some cases, its tempering through negligence principles is necessary most often to achieve efficiency). Strict liability's ineffectiveness in lowering overall loss is especially evident in

In addition, the costs of a due care standard should not exceed the benefits gained from negligence liability instead of article 4A's strict scheme. A reduction in losses caused by a higher duty of care under negligence liability could outstrip the administrative costs associated with negligence. Judicial animosity toward the unfairness of nonfault allocation might increase litigation expense when courts object and find liability in the absence of specific Code provisions.²⁵⁹ Litigation between the customer and the originator's bank to avoid suffering their faultless loss as in section I.A.1 might be just as expensive as a negligence determination. 4A already requires reasonableness determinations for an evaluation of the security procedure²⁶⁰ and these standards could illuminate the conduct expected of the beneficiary's bank.

Negligence liability should also reduce social cost by fostering more efficient pricing of EFTs. While strict liability imposed on the originator or its bank would allow *easier* pricing,²⁶¹ liability of the beneficiary's bank in these cases produces a more efficient mechanism because the beneficiary's bank can better gauge potential losses²⁶² and therefore can set charges high enough to compensate for its losses. The cost for the LCA, however, is still lowest from society's viewpoint. Transfers will continue but prices should settle at the socially efficient level:²⁶³ high enough to encourage a level of transfers at which overall loss is minimized.

Finally, nonefficiency considerations favor the application of negligence liability. Judges, presented with innocent parties seeking compensation or with a beneficiary's bank's remorseless or unblinking conduct, can escape the dilemma with which the arbitrary rules of 4A would otherwise present them.²⁶⁴ Negligence law provides the tool both to meet the Code's general fault structure and to achieve a result consistent with basic notions of fairness. The Code's tenor indicates

this Note's hypothetical cases, because loss prevention through strict liability assumes that the liable party can affect the outcome. The only way here for the party apparently strictly liable under 4A to influence the outcome, is to incur prohibitive cost. See *supra* text accompanying notes 247, 249.

259. See Phillips, *supra* note 190, at 261-62; see also Lingl, *supra* note 238, at 660 (arguing that strict liability determination facially costs less, but ignoring individual judicial actions to escape strict liability allocation).

260. See U.C.C. § 4A-202(b).

261. See Patrikis et al., *supra* note 115, at 224 (arguing that certainty of strict liability indicates predictable costs and eliminates "false pricing strategies"); Tallackson & Vallejo, *supra* note 83, at 665 (same).

262. Thévenoz, *supra* note 17, at 900; Koh, *supra* note 55, at 112.

263. Koh, *supra* note 55, at 111 ("Generally, assigning liability to the cheapest cost avoider will make wire transfers less expensive."); see *supra* notes 257-58 and accompanying text.

264. For an example of one court's reaction to a beneficiary's bank's obvious disregard for harm, see *Evra Corp. v. Swiss Bank Corp.*, 522 F. Supp. 820, 829 (N.D. Ill. 1981) (pre-4A), modified, 673 F.2d 951 (7th Cir.), cert. denied, 459 U.S. 1017 (1982).

that such moral considerations influenced its drafters.²⁶⁵ However, tort liability, as opposed to a contractual scheme like 4A, reflects public policy concerns that deserve affirmation; incorporation of the common law facilitates society's input.²⁶⁶ An inquiry into the beneficiary's bank's behavior allows conduct, and not mere status, to determine accountability²⁶⁷ — a concept imbedded, no doubt, in American law. Extra-Code societal concerns thus provide additional support for a negligence action against the beneficiary's bank.

CONCLUSION

The UCC is not perfect. Its static provisions cannot respond adequately to all situations, especially those that fall outside its terms or at the perimeter of its logic. Section 1-103's explicit allowance for common law remedies evidences this shortcoming. The common law escape provision may alone properly resolve these hard cases, where the UCC does not apply or where it demands objectionable results, in a manner consistent with expectations of responsibility and efficiency.

Article 4A recognizes the need for occasional supplementation of Code liability.²⁶⁸ When a beneficiary's bank negligently pays a wire transfer, an action against it should be allowed, because 4A fails to resolve the problem adequately. Article 4A probably does not provide a solution without causing conflict within the Code and with other relevant rules. Even if contradiction is avoided, UCC liability anomalously falls on one of two innocent parties and a more guilty one escapes, causing inefficiency, unfairness, and, predictably, judicial misgivings. The potential liability will not straitjacket the banking system, for the duty of reasonable care will only arise in a small number of cases and require limited actions comparable to those already mandated by federal law.

Without a Code provision imposing least-cost risk-avoider liability, the common law of negligence facilitates the proper outcome by holding the lowest-cost avoider and guiltiest party responsible. Resort to common law liability is therefore appropriate here; 4A's provisions do not clearly displace it. The policies of the UCC militate both against and in support of negligence, providing no insurmountable burden to incorporation of due care concepts from outside the Code. Negligence liability is actually consistent with its structure. Beyond the UCC's

265. Phillips, *supra* note 190, at 280-86. While 4A was drafted about forty years after the UCC was originally created, respect for the Code's basic structure and for its past and more recent drafters suggests that moral considerations retain their value.

266. Joseph G. McCarty, Note, *U.C.C. Article 4A — Wire or Wire Not? Consequential Damages Under Article 4A and a Critical Analysis of Evra v. Swiss Bank*, 11 *COMPUTER L.J.* 341, 363 (1991).

267. See Phillips, *supra* note 190, at 277.

268. U.C.C. § 4A-105(d): "[A]rticle 1 [which includes § 1-103] contains general . . . principles of construction and interpretation applicable throughout this article."

limited view, independent social concerns support a negligence claim. The Code is law, after all, and allowing a negligence suit against a beneficiary's bank will not only efficiently allocate losses but also comport with instinctive concepts of justice.